# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1906.**

## No. 118.

MERCHANTS HEAT AND LIGHT COMPANY, PLAINTIFF IN ERROR,

*vs.*

JAMES B. CLOW AND SONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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**FILED SEPTEMBER 22, 1905.**

**(19,910.)**

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1906.

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1 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division, *ss:*

26678.

JAMES B. CLOW & SONS, a Corporation,
*vs.*
MERCHANTS HEAT AND LIGHT COMPANY, a Corporation.

*Transcript of Record for the Supreme Court of the United States.*

Newton Wyeth, W. B. Wilson, W. L. Fisher, Attorneys for Plaintiff.

Charles H. Aldrich, W. H. H. Miller, Henry S. McAuley, Attorneys for Defendant.

2 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

To Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said District:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States at Washington under the writ of error heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, towit:—

1. Præcipe.
2. Summons and return of Marshal.
3. Declaration.
4. Plea and Notice of Set Off.
5. Bill of Particulars.
6. Stipulation waiving Jury.
7. Judgment entered September 6th, 1905.
8. Bill of Exceptions.
9. Petition for Writ of Error.
10. Assignments of Error.
11. Bond on Writ of Error.
12. Order allowing Writ of Error.
13. Certificate of Jurisdictional Questions involved.

ALDRICH & McAULEY,
*Attorney- for Defendant.*

3 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, on Monday September the 18th, 1905, being one of the days of a regular term of said Court begun and held at the United States Court room in the City of Chicago in said District and Division on Monday July 3rd in the year of our Lord one thousand nine hundred and five, and of the Independence of said United States the one hundred and twenty-ninth year, before the Honorable Arthur L. Sanborn, Judge of the district Court of the United States for the Western District of Wisconsin, present and holding said Circuit Court by virtue of the following Order of Assignment entered of record in said Court, towit:—

4 *Copy of Assignment of Judge Arthur L. Sanborn, Monday, July 3rd,* 1905.

Present: Hon. Peter S. Grosscup, presiding Circuit Judge.

By virtue of the authority vested in me by law and because in my judgment the public interest so requires, I do hereby designate and appoint the Honorable Arthur L. Sanborn, Judge of the District Court of the United States for the Western District of Wisconsin; the Honorable J. Otis Humphrey, Judge of the District Court of the United States for the Southern District of Illinois; the Honorable A. B. Anderson, Judge of the District Court of the United States for the District of Indiana; and the Honorable Francis M. Wright, Judge of the District Court of the United States for the Eastern District of Illinois, to aid the Judges of the Circuit and District Courts of the United States for the Northern District of Illinois in holding the Circuit and District Courts of the United States in said Northern District of Illinois at Chicago and Freeport, with all the powers conferred on them by the Act of Congress in the premises.

5 Be it remembered that on the 14th day of March, 1903, James B. Clow & Sons, plaintiff, by M. R. Osborn its attorney, (Mr. Newton Wyeth being afterwards substituted as attorney for said plaintiff), filed in the clerk's office of said court its præcipe for summons, and that on the same day said writ was issued and delivered to the marshal of said district to execute, the same being afterwards returned and filed on the 25th day of March, 1903, which said præcipe, summons and marshal's return thereon are severally in the words and figures following, towit:—

UNITED STATES OF AMERICA,
*Northern District of Illinois, Northern Division, ss:*

Circuit Court, May Term, A. D. 1903.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT AND LIGHT COMPANY.

In Law. Damages, $15,000.

The Clerk of said Court will issue a Summons in said cause to said defendants, in a plea of Trespass on Case on promises to the

damage of said plaintiff in the sum of Fifteen Thousand Dollars direct the same to the United States Marshal for said District to execute, and make it returnable to the May Term of said Court, 1903.
Dated this 14th day of March A. D. 1903.

M. R. OSBORN,
*Plaintiff's Attorney.*

To Marshall E. Sampsell, Esq., Clerk.

Endorsed: Filed Mar. 14, 1903. Marshall E. Sampsell, Clerk.

6 Circuit Court of the United States of America, Northern District of Illinois, Northern Division, *ss:*

The United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon Merchants Heat and Light Company, if found in your district, to be and appear before our Judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof to be holden at Chicago, in the District aforesaid, on the first Monday of May next to answer unto James B. Clow & Sons of a plea of trespass on the case upon promises, to its damage, as is alleged, of Fifteen Thousand ($15,000.) Dollars, and have you then and there this Writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, aforesaid, this 14th day of March in the year of our Lord one thousand nine hundred and three.

[SEAL.] MARSHALL E. SAMPSELL, *Clerk.*

I have served this writ within my District upon the within named "Merchants Heat and Light Company" by reading the same to and in the presence and hearing of W. H. Schott, General Manager of the said company, at the same time delivering to him personally a true copy thereof on the 23rd day of March A. D. 1903.

I was unable to find the President or any other officer of the said company within my District.

JOHN C. AMES,
*U. S. Marshal,*
WM. E. CASS, *Deputy.*

| | |
|---|---|
| 1 Service | $2.00 |
| 1 Mile | .06 |
| | $2.06 |

Endorsed: Filed Mar. 25, 1903. Marshall E. Sampsell, Clerk.

7 *Copy of Declaration. Filed April 22d, 1903.*

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of United States for the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS, a Corporation,
*vs.*
MERCHANTS HEAT & LIGHT COMPANY, a Corporation.

Now comes James B. Clow & Sons, the plaintiff in this suit, by Morris R. Osborn, its attorney, and complains of the defendant, Merchants Heat & Light Company, of a plea of trespass on the case upon promise.

For that whereas the plaintiff is, and at and prior to the time of the commencement of this suit, was and ever since has been a corporation duly organized under the laws of the State of Illinois, and a Citizen of the State of Illinois; and the defendant, Merchants Heat & Light Company, at the time of the commencement of this suit was, ever since has been and still is, a corporation duly organized under the laws of the State of Indiana, and a citizen of the State of Indiana.

For that whereas, the said defendant, heretofore, towit: On the thirtieth day of March in the year of our Lord One Thousand Nine Hundred and Three, at Chicago, towit: at the District aforesaid, became and was indebted to the said plaintiff, in the sum of fifteen thousand dollars of lawful money of the United States of America, for divers goods, wares and merchandise, by the said plaintiff, before that time sold and delivered to the said defendant 8 and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, towit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, The said defendant afterwards, towit: on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares and merchandise of the said plaintiff, the said defendant, Merchants Heat & Light Company, then and there undertook, and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff, avers, that the said goods, wares and merchandise last mentioned, at the time of the sale and delivery thereof were reasonably worth the further sum of fifteen thousand dollars, of like lawful money as aforesaid towit: at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, The said defendant, afterwards, towit: on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of fifteen thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out and
9 expended for the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant. And being so indebted, the said defendant in consideration thereof, afterwards, towit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, The said defendant, afterwards towit: on the day and year last aforesaid, and at the place last foresaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of Fifteen Thousand Dollars of like lawful money as aforesaid and being so found in arrears and indebted to the said plaintiff the said defendant in consideration thereof afterwards towit: on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, The said defendant, although often requested, etc., has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff
10 the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of Fifteen thousand Dollars, and therefore the said plaintiff brings suit, etc.

MORRIS R. OSBORN,
*Plaintiff's Attorney.*

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of United States for the Northern District of Illinois.

James M. Johnson, being duly sworn on his oath, says that he is the Treasurer of James B. Clow & Sons, a corporation, the plaintiff in the above entitled cause; that the demand of the said plaintiff is for the reasonable value of goods, wares and merchandise, consisting mainly of pipes, valves, etc., sold and delivered by the plaintiff to the defendant at the defendant's special instance and request and that there is due to the plaintiff from the defendant, after allowing to the defendant all just credits, deductions and off-sets, the sum of Nine Thousand three hundred and ninety-one Dollars and one cent ($9391.01).

JAMES M. JOHNSON.

Subscribed and sworn to before me this 22nd day of April.

JAMES F. SLAPAK,
[SEAL.] *Notary Public, Cook County, Illinois.*

Endorsed: Filed Apr. 22, 1903. Marshall E. Sampsell, Clerk.

11 *Copy of Plea of General Issue and Notice of Set-off. Filed August 14th, 1903.*

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT AND LIGHT COMPANY.

And the defendant, by Charles H. Aldrich and W. H. H. Miller, its Attorneys, comes and defends the wrong and injury when, etc., and says that it did not promise in manner and form as the plaintiff hath above thereof complained against it; and of this, it put itself upon the country, etc.

CHARLES H. ALDRICH,
W. H. H. MILLER,
*Attorneys for Defendant.*

To the above-named plaintiff:

The plaintiff will take notice that on the trial of this cause the defendant will give in evidence, and insist, that the plaintiff was before and at the time of the commencement of this action, and still is, indebted to the defendant in the sum of Fifteen Thousand

Dollars ($15,000) for and on account of the failure of said plaintiff to furnish pipe, valves and fittings by October first, 1902,
12 in accordance with the contract between the plaintiff and defendant bearing date August 13, 1902, that by and on account of each failure the defendant was put to great additional expense in the installation of its plant by reason of the difficulty of making the necessary excavations during the months of December, January and February, 1902 and 1903.

And also that by reason of plaintiff's delay in furnishing said pipes, valves and fittings as agreed, it, the said defendant, was unable to furnish its customers with heat, light and power until long after the time it had agreed so to do, and also lost many contracts to so furnish heat, light and power which it could have secured had the completion of its, the defendant's, plant not been delayed as aforesaid by plaintiff.

Whereby the defendant was damaged in the sum of Fifteen Thousand Dollars ($15,000), and that on such trial the defendant will set off and allow to the plaintiff against any demand on its part to be proved on such trial, so much of the said sum of money so due it to the defendant as will be sufficient to satisfy and discharge such demand.

Dated this 10th day of August A. D. 1903.

CHARLES H. ALDRICH,
W. H. H. MILLER,
*Attorneys for Defendant.*

To M. R. Osborn, Esq., Attorney for the Plaintiff.

13 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT AND LIGHT COMPANY.

William C. Bobbs, being duly sworn upon his oath, says that he is President of the above-named defendant, and that he verily believes it has a good defense to said suit upon the merits, unto the whole of the plaintiff's claim and demand.

WILLIAM C. BOBBS.

STATE OF INDIANA, *Marion County, ss:*

Subscribed and sworn to before me, this 10th day of August, A. D. 1903.

[SEAL.]

JAMES W. FESLER,
*Notary Public.*

Endorsed: Filed Aug. 14, 1903. Marshall E. Sampsell, Clerk.

14 Additional Notice of set-off filed by leave of Court and upon notice to the plaintiff March 29th, 1905.

15 *Copy of Additional Notice of Set-off.*

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

26678.

James B. Clow and Sons
*vs.*
Merchants Heat and Light Company.

The plaintiff will take notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the defendant in the sum of Four Thousand Dollars ($4,000.00), for and on account of over-payments made by said defendant to said plaintiff.

ALDRICH & McAULEY,
*Attorneys for Defendant.*

(Endorsed:) Filed Mar. 29, 1905. Marshall E. Sampsell, Clerk.

16 *Copy of Bill of Particulars. Filed December 3rd,* 1903.

United States of America,
*Northern District of Illinois, Northern Division, ss:*

In the Circuit Court of the United States.

26678.

James B. Clow & Sons
*vs.*
Merchants Heat & Light Company.

Bill of Particulars.

Overcharges in Invoices rendered by James B. Clow & Sons.

| | | | | |
|---|---|---|---|---|
| 1902. | | | | |
| October | 16. | Invoice bill 680 feet, 2⅝ inches, 15 inch pipe, at $3.61 per foot | .... | $2455.59 |
| | | Contract price, $3.32 per foot; Overcharge ................ | .... | 197.26 |
| 1902. | | | | |
| October | 20. | Invoice bill 497 feet, 7⅝ inches, 15 inch pipe at $3.61 per foot | .... | $1796.46 |
| | | Contract price, $3.32 per foot Overcharge ................ | .... | 144.31 |

Above paid by Voucher No. 116, dated November 8, 1902.

Receipted by James B. Clow & Sons, December 6, 1902.

| | | | |
|---|---|---|---|
| 1902.<br>November | 5. Invoice bill, 273 feet, 9¾ inches, 20 inch pipe at $4.67 per foot .... | | $1278.71 |
| 17 | Contract price, $3.89 per foot. Total overcharge ........... | $213.57 | |
| 1902.<br>November | 5. Invoice bill, 281 feet, 9 inches, 20 inch pipe at $4.67 per foot .... | | $1315.77 |
| | Contract price, $3.89 per foot, Overcharge ................ | 219.77 | |
| November | 8. Invoice bill*ed*, 262 feet, 5¾ inches 20 inch pipe at $4.67 per foot .... | | $1225.78 |
| | Contract price, $3.89 per foot. Overcharge ................ | $204.73 | |
| November | 12. Invoice bill 300 feet, ⅝ inch, 20 inch pipe at $4.67 per foot .... | | $1401.25 |
| | Contract price, $3.89 per foot. Overcharge ................ | $234.04 | |
| | Above paid by voucher No. 154, dated November 21, 1902. | | |
| | Receipted by James B. Clow & Sons, November 22, 1902. | | |
| | To 72 feet, 20 inch pipe purchased of Knight & Jillson, at $4.14 ...................... | $298.08 | |
| | Contract price with James B. Clow & Sons, $3.89........ | 280.08 | |
| | Increased cost chargeable against Clow & Sons.. | 18.00 | |
| | Expense of refilling and re-excavating trench and extra barricades due to delay in delivery of 72 feet, twenty inch pipe, finally purchased of Knight & Jillson, Indianapolis, at corner Washington & Delaware Streets .................... | | $210.00 |
| 18 | Increased cost of laying pipe during months of December, 1902, January and February, 1903, due to delay in delivery. | | |
| | 2325 feet, 15 and 20 inch pipe, $2.75 per 3* foot ........................ | | $6393.75 |
| | 6975* ........................... | | (6298.15)* |
| | Additional premium for liability insurance | | $575.83 |
| | Additional expense for superintendent and foreman .......................... | | $1055.00 |
| | Estimated loss on account contracts for heating by delay in completion of contract of James B. Clow & Sons.......... | | $6608.10 |

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[* In pencil in copy.]

(Radiation connected November 24, 1903—113 consumers,—160,000 square feet. At least one half of these consumers could have been connected December 1, 1902, had contract with Clow & Sons been fulfilled.)

19 *Estimated Loss Account Contracts for Light and Power by Delay in the Completion of Contract of James B. Clow & Sons from January* 1, 1903, *to Time of Connection.*

| | |
|---|---|
| F. A. Braxton | $31.50 |
| Boehmer Shoe Co. | 130.00 |
| J. A. Everett | 48.75 |
| H. A. Comstock | 32.00 |
| J. Cohen | 41.45 |
| Columbia National Bank | 90.00 |
| J. A. Chambers | 210.00 |
| Fred Heier (W. Pearl) | 62.50 |
| G. L. Knox | 38.50 |
| June Bros. | 232.25 |
| Indianapolis Electrotype Co. | 82.00 |
| C. W. Meikel & Co. | 400.00 |
| M. McManus | 16.00 |
| W. H. Quinn | 45.00 |
| Reliable Furniture Company | 262.00 |
| J. H. Reed | 34.00 |
| W. H. Rolls' Sons | 2.25 |
| C. L. Rost | 44.30 |
| Fred Heier (S. New Jersey) | 107.50 |
| Charles Sheperkoter | 39.30 |
| B. Samuels | 87.00 |
| A. Steffen | 35.75 |
| Stegmeier Bros. | 240.00 |
| William Tron | 256.00 |
| William G. Weiss | 75.00 |
| E. H. Wilson | 115.00 |
| M. Wolfe | 12.50 |
| Badger Furniture Co. | 550.00 |
| L. S. Ayres & Company | 584.00 |
| William H. Block | 970.00 |
| Besten & Langen | 152.50 |
| Bobbs-Merrill Company | 258.00 |
| Charles Hartman | 57.00 |
| Iske Brothers | 14.50 |
| W. H. Messenger | 44.00 |
| L. E. Morrison | 35.50 |
| M. Moyer | 198.00 |
| Charles Mayer & Co. | 695.00 |
| Peoples Outfitting Co. | 325.00 |
| F. H. Rupert | 32.00 |
| Sander & Recker | 39.00 |

| | | |
|---|---|---|
| Vonnegut Hardware Co. | 266.00 | |
| Julius C. Walk & Son | 114.00 | |
| H. P. Wasson & Co. | 2410.00 | |
| | $9515.05 | |
| Estimated operating expenses 50% | 4757.52 | |
| Estimated profits | | $4757.53 |

Endorsed: Filed Dec. 3, 1903. Marshall E. Sampsell, Clerk.

20 *Copy of Stipulation Waiving Jury. Filed April* 10*th,* 1905.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

Gen. No. 26678.

James B. Clow & Sons
*vs.*
Merchants Heat & Light Co.

It is hereby stipulated by and between the parties to the above entitled cause that a jury may be waived therein, and the said cause be submitted to the court for trial without the intervention of a jury;

And it is further stipulated between the parties hereto that this stipulation is made, and any order of court entered thereon shall be, without prejudice to the defendant to present and raise before the court the question of jurisdiction which has been heretofore presented in this cause.

NEWTON WYETH,
*Attorney for Plaintiff.*
CHARLES H. ALDRICH,
*Attorney for Defendant.*

Dated this 27th day of March, A. D. 1905.

(Endorsed:) Filed April 10, 1905. Marshall E. Sampsell, Clerk.

21 *Copy of Order of Monday, September* 18*th,* 1905, *Before Hon. Arthur L. Sanborn, District Judge.*

26678.

James B. Clow & Sons, a Corporation,
*vs.*
Merchants Heat & Light Company, a Corporation.

Now on this day come again the parties by their attorneys, the plaintiff being represented by Mr. Newton Wyeth, one of its attorneys, the defendant by Mr. Charles H. Aldrich, Mr. W. H. H. Miller and Mr. Henry S. McAuley; and thereupon the Court being fully advised in the premises finds the issues for the plaintiff and assess- its damages against said defendant at the sum of Nine Thousand and Eighty-two Dollars and twenty-one cents ($9082.21).

It is thereupon considered and adjudged by the Court that the plaintiff, James B. Clow & Sons, have and recover of said defendant, Merchants Heat & Light Company, said sum of Nine Thousand and Eighty-two Dollars and twenty-one cents ($9082.21) its damages so as aforesaid found together with the costs herein to be taxed, and that the plaintiff have execution therefor; and by agreement of counsel this judgment is now entered *nunc pro tunc* as of September 6th, 1905, to the entry of which judgment the defendant excepts and presents its bill of exceptions, which is duly signed and sealed by the trial judge, and filed by the clerk of said court.

22 Bill of Exceptions, petition for Writ of Error, Assignment of Errors, Bond on Writ of Error, Order allowing Writ of Error and Certificate of jurisdictional questions involved, filed Monday September 18th, 1905, are in the words and figures following, towit:

23 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

26678.

CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

*Bill of Exceptions.*

Be it remembered that in the above entitled cause the defendant moved to quash the service of process in said cause, which motion was opposed by the plaintiff, and on the hearing of such motion such proceedings were had that the following bill of exceptions was signed and sealed therein, to-wit:

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

Be it remembered that in the above entitled cause the defendant moved to quash the Marshall's return to the summons, appearing

24 specially for that purpose and not otherwise, and in support of said motion, which was in the words and figures following, to-wit:

"Circuit Court of the United States, Northern District of Illinois, Northern Division.

No. 26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

*Motion to Quash Marshall's Return to Summons.*

The Merchants Heat and Light Company, defendant in the above entitled cause, appears specially for the purpose herein set forth and for no other purpose, and hereby moves the court to quash the return of the Marshall upon the summons issued in said cause, a copy of which summons and return are attached to this motion, for the reason that said defendant is and was at the time this action was commenced and ever since has been a corporation organized and existing under the laws of the State of Indiana, and engaged in business only in said State and never has had any office, place of business or agency in the State of Illinois.

CHARLES H. ALDRICH,
*Attorney for Defendant."*

Filed the affidavit of William H. Schott, which affidavit was in the words and figures following, to-wit:

"STATE OF INDIANA, *Marion County, ss:*

William H. Schott, being duly sworn upon his oath, says that he is a citizen and resident of the City of Chicago, Illinois; that he is by occupation an engineer and contractor and has and maintains offices in the Marquette Building in said city of Chicago; that he is engaged in the construction, equipment and operation of water heating and lighting plants at various places in the United States; that for six months last past he has been engaged, among other things, in installing a steam heating and electric lighting plant for the Merchants Heat & Light Company, a corporation organized and existing under the laws of the State of Indiana and doing business in the city of Indianapolis in said State; that said plant is being con- 25 structed for the purpose of supplying the merchants and other citizens of said city of Indianapolis with light, heat and power and that said Merchants Heat and Light Company is not engaged in any business in the said city of Chicago or State of Illinois as affiant is informed and believes.

Affiant further says that at the time he was served with summons in the case of James B. Clow & Sons against Merchants Heat and Light Company on the twenty-third day of March, 1903, he was in his office in the city of Chicago engaged in his own personal business and was not there as the representative of the said Merchants Heat and Light Company for any purpose, and that the said Merchants Heat and Light Company neither at the time of such service nor at any other time has had any place of business, office, agency or agent authorized to conduct any business for it in the State of Illinois.

And further saith not.

W. H. SCHOTT.

Subscribed and sworn to before me this 2nd day of May, 1903.

JAMES W. FESLER,
[SEAL.] *Notary Public.*

Commission expires May 2, 1904."

And likewise in support of said motion the affidavit of William C. Bobbs, which affidavit was in the words and figures following, to-wit:

"STATE OF INDIANA, *Marion County, ss:*

William C. Bobbs, being duly sworn upon his oath, says that he is a citizen and resident of the city of Indianapolis in the state of Indiana; that he is President of the Merchants Heat and Light Company of said city; that said company is a corporation organized and existing under the laws of the State of Indiana, engaged in supplying heat, light and power to the merchants and other citizens of said city of Indianapolis; that said company has no office or place of business of any kind whatsoever in the city of Chicago, nor is it engaged in business of any kind in said city or state, but its sole business and place of business is at the said city of Indianapolis, and it has not now and never has had any office, agency, place of business or agent authorized to carry on business for it in the state of Illinois.

And further saith not.

WILLIAM C. BOBBS.

Subscribed and sworn to before me this 2nd day of May, 1903.

JAMES W. FESLER,
[SEAL.] *Notary Public.*

Commission expires May 2, 1904."

26 And the plaintiff in said cause, in opposition to said motion to quash, filed the affidavit of William E. Clow, which affidavit was in the words and figures following, to-wit:

"UNITED STATES OF AMERICA,
*Northern District of Illinois:*

In the Circuit Court of the United States for the Northern District of Illinois.

No. 26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

Comes now William E. Clow, w-o being duly sworn on his oath, deposes and says that he is and during the whole of the time during which the negotiations between the plaintiff and the defendant herein with reference to the matters in controversy in this cause were being conducted, has been continuously and still is the Vice President of the plaintiff and actively engaged in the conduct of its affairs; that he knows W. H. Schott and has had repeated conferences with him with reference to the matters in controversy between the plaintiff and the defendant in this cause; that the said W. H. Schott has throughout in all the said matters in controversy in this cause acted as the representative and General Manager of the defendant; that during the whole of such time the said W. H. Schott has maintained and still does maintain an office in the building known as the Marquette Building in the city of Chicago, Northern District of Illinois; that at said office the business between the plaintiff and the defendant has been conducted; that this affiant representing the plaintiff has had numerous conferences with the said W. H. Schott representing the defendant at the said office; that he has at various times conferred with said W. H. Schott with reference to said matter over the telephone with said W. H. Schott at the said office in the said Marquette Building; that so far as this affiant is informed and believes no person other than attorneys who may represent the said defendant in court has had any share in the said negotiations or in any business between this plaintiff on behalf of the defendant except the said W. H. Schott; that the said office in the said Marquette Building was continuously treated as the office and place of business of the defendant where all its business was transacted and the said W. H. Schott as its regular and only authorized representative; that practically the whole negotiations and the making of the contracts between the
27 plaintiff and the defendant with reference to the matters in controversy herein were had and done in the city of Chicago, in said Northern District of Illinois, and at the said office of the defendant in said Marquette Building; that the said W. H. Schott during the whole of said period since said negotiations began and up to the present time was and is a resident of the State of Illinois and of the said city of Chicago; that the said W. H. Schott has been by the defendant continuously advertised as its General Manager, and upon the letter heads of the defendant upon which in the correspondence between the plaintiff and the defendant the said defendant wrote its letters, the said W. H. Schott is advertised as the General

Manager of the defendant, samples of which letters are submitted; that said office in said Marquette Building has been by the defendant recognized and treated as the office of the defendant, as shown by the correspondence of the defendant submitted herewith and otherwise; that the letters and telegrams submitted herewith purporting to come from W. H. Schott, or from the defendant, are genuine and received by the plaintiff from the defendant in the usual course of mail.

And deponent further sayeth not.

WILLIAM E. CLOW.

Subscribed and sworn to before me this 12th day of June, A. D. 1903.

JAMES F. SLAPAK,
[SEAL.] *Notary Public,*
*Cook County, Illinois.*

My Commission expires Jan. 20th, 1907."

And also read in evidence the following letters and telegrams referred to in said affidavit, to-wit:

"CHICAGO, ILL., *Sept. 27th*, 1902.

James B. Clow & Sons, Chicago, Ill.

GENTLEMEN: Please enter our order for immediate shipment to Indianapolis, in addition to the orders which you now have, for 300 ft. 3 in. galvanized pipe and

60—3 x 1 Galv. Tees.
25—2½ x 1 Galv. Tees.
50—1½ x 1 " "
70—1 x 1 " "
265—1 in. Plugs.
2—3 in. Brass gate valves.
2—2½ " " "
1—2 " " "
3—1½ " " "

28 On the 20" pipe line there shall be placed on the end of each pipe a flange peoned on for all fittings, valves and expansion joints.

Yours truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

"W. H. Schott, Engineer & Contractor, Marquette Building.
L. D. Tele. Cen. 2448.
Specialties.
Gen. Station Htg. Plants, Water Works, Gas Plants, Elec. Light, Power & Street Ry. Plants.

CHICAGO, ILL., *Sept. 6th*, 1902.

James B. Clow & Sons, Chicago, Ill.

GENTLEMEN: Please ship to us promptly as possible:

2—20" flanged American valves with wheel.
2—15" " " " " "
1—20" " ¼ Bends.
22—20 x 10 " Tees.
2—20 x 12 " "
2—20 x 15 " "
1—20 x 20 " "
6—20 x 10 " Crosses.
1—20 x 12 " "
1—20 x 15 " "
1—20" Blank Flange.
1—20 x 15 Flanged Reducer.

All 20" pipe to have standard flanges shrunk on and peoned, and list of flanges does not include flanges on pipe. All 15" pipe to be screw and socket. Ends at expansion joints to be threaded only; no couplings to be thereon.

10—15 x 10 Flanged Tees.
1—15 x 15 " "
2—15" Flanges, tapped 12"
2—15 " " 15"
2—15 " blank.
3—12 " tapped 12"
1—12 " blank.
26—10 " tapped 10"
18—10 " blank.

All flanges and fittings to be faced and drilled standard, page 62 The Clow Catalogue. Mark Each Pipe Section to which it belongs and mark pipe in consecutive numbers.

29 Yours truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

"CHICAGO, ILL., *Sept. 27th*, 1902.

James B. Clow & Sons, Chicago, Ill.

GENTLEMEN: Please enter our order for immediate shipment to Indianapolis, in addition to the orders which you now have, as follows:

3—118

1—15″ American Flanged gate valves, together with companion flanges.
5—15 x 10 Flanged Crosses.
10—10 in. Companion Flanges, tapped for 10″ pipe.
1—15 in. " " " " 12″ "
12—15 in. " " " " 15″ "

Yours truly,

MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

"Merchants Heat and Light Company.

Offices 208, 209, 210 Majestic Bldg.

Wm. C. Bobbs, Pres.; H. P. Wasson, V.-Pres.; Ferdinand I. Mayer, Treas.; Henry Kahn, Auditor; W. H. Schott, Gen. Mgr.; Frederick M. Ayres, Sec'y.

INDIANAPOLIS, IND., *June 6th*, 1903.

Mr. W. E. Clow, James B. Clow & Sons, Chicago, Ill.

DEAR SIR: Replying to your favor of the 4th will say, that I will not be here to take care of any business until about the 18th and at that time will take up in detail the various credits to which we are entitled.

Yours very truly,

W. H. SCHOTT, *Gen. Mngr.*"

"Postal Telegram & Cable Company.

*Telegram.*

INDIANAPOLIS, IND., *Dec.* 27, 1902.

Paid.

James B. Clow & Sons, Chicago, Illinois:

See Mr. Schott at Chicago office Monday 10 A. M.

MERCHANTS HEAT & LIGHT COMPANY."

"Merchants Heat and Light Company.

Offices 208, 209, 210 Majestic Bldg.

Wm. C. Bobbs, Pres.; H. P. Wasson, V.-Pres.; Frederic M. Ayres, Sec'y; Ferdinand L. Mayer, Treas.; Henry Kahn, Auditor; W. H. Schott, Gen. Mngr.

INDIANAPOLIS, IND., *Sept. 4th*, 1902.

James B. Clow & Sons, Chicago, Illinois.

GENTLEMEN: Please enter our order for immediate shipment, prices to be in accordance with our contract, for the following list of fittings:

20—12" cast iron screwed tees.
20—10 " " " "
20— 8 " " " "
20—12 plugs.
20—10 "
20— 8 "
1—12 to 10 bushing.
10—12 to 8 "
10—12 to 6 "
10—12 to 4 "
20—10 to 8 "
20—10 to 6 "
20—10 to 4 "
10—8 to 6 "
10— 8 to 4 "

31

4—12" American Flanged Gate Valves.
2—10" " " " "
3— 8" " " " "

Please ship these goods at the earliest possible date, and oblige,
Yours very truly,
MERCHANTS HEAT & LIGHT CO.,
By W. H. SCHOTT, *Gen. Mngr.*"

And likewise in opposition to said motion to quash, the affidavit of Horatio S. Collins, which affidavit was in the words and figures following, to-wit:

"UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the Circuit Court of United States for Northern District of Illinois.

No. 26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

Comes now Horatio S. Collins, who being duly sworn on his oath, deposes and says: that he is, and prior to and ever since the 13th day of August, 1902, was in the employ of the plaintiff herein as *therein* City Salesman for the City of Chicago; that as such City Salesman he conducted the negotiations with the defendant, Merchants Heat and Light Company, which resulted in the execution of the contract on August 13th, 1902, between the plaintiff and the defendant herein, a copy of which is attached hereto and made a part hereof; that in said negotiations and in the execution of said contract this affiant represented the plaintiff, and W. H. Schott, as General Manager of the defendant, represented and acted for the defendant;

that said contract was signed "James B. Clow & Son" by this affiant and accepted this 13th day of August, 1902, "Merchants Heat and Light Company," by W. H. Schott, General Manager; that all of the negotiations leading up to the said contract, and up to the sale
by the plaintiff to the defendant of the various goods and
32 chattels described in said contract and in the declaration
herein, the said W. H. Schott acted for, and as the representative and agent of the defendant; that the said W. H. Schott during the said entire period was and still is a resident of the city of Chicago in said Northern District of Illinois; that his acts as Genera Manager of said corporation in the said negotiations and in the execution of said contract have been recognized, adopted and acted upon by the said defendant; that the said W. H. Schott is by the said defendant regularly advertised as their General Manager, as, for example, upon the letter heads of the said corporation; that considerable correspondence has taken place with reference to the matters in controversy in this declaration between the plaintiff and the defendant; that the said correspondence has been conducted on the part of the defendant almost entirely by the said W. H. Schott as General Manager of the defendant; that the numerous letters received by the plaintiff from the defendant are almost all upon the letter heads of the defendant, in which the said W. H. Schott is advertised as, "General Manager."

That during the whole of the time during which said negotiations were taking place, and when said contract was made, and when the various goods and merchandise referred to in the declaration herein were delivered by the plaintiff to the defendant, the said W. H. Schott maintained an office at a building in the city of Chicago, in said Northern District of Illinois, known as the Marquette Building, at which office the said defendant, W. H. Schott, acting on behalf of, and as the General Manager of the said defendant, conducted all of the business transacted by the plaintiff with the defendant; that this affiant was at numerous times in the said office in the Marquette Building with the said W. H. Schott and always upon the business in which the said W. H. Schott was acting for and representing the said defendant; that this affiant verily believes that the said W. H. Schott is the regular authorized agent of the said defendant in the city of Chicago, and that the office maintained by the said W. H. Schott in the city of Chicago is and during the whole period herein referred to has been the regular office of the defendant in the said city of Chicago, that after the making of said contract this affiant repeatedly met the said W. H. Schott in the said office in the Marquette Building usually on Mondays and always with reference to the business in which the said W. H. Schott acted as the General Manager and representative of the defendant, which office has ever since been and still is maintained by the said W. H. Schott with no visible change in the ownership and management thereof; that the whole of the business relating to the matters in controversy in this suit have been conducted on behalf of the defendant by said W. H. Schott, and

Deponent further sayeth not.

HORATIO S. COLLINS.

33 Subscribed and sworn to before me this 12th day of June, A. D. 1903.

JAMES F. SLAPAK,
[SEAL.] *Notary Public,*
*Cook County, Illinois.*

My Commission expires Jan. 20th, 1907."

"CHICAGO, *August 13th,* 1902.

Merchants Heat & Light Co., 209 Majestic Bldg., Indianapolis, Ind.

GENTLEMEN: We hereby agree to furnish you with the pipe, valves and fittings, detailed specifications on the amount to be furnished as to the list of fittings, valves, etc., within ten days, and the list of pipe given you herewith is subject to change, such change, however, to be made prior to August 20th. Prices for the material to be as per correspondence, telegrams, etc., under dates of August 4th, 5th and 6th, 1902, and on the large pipe to be as per detail sheet under date of August 13th, all attached hereto and made a part of this proposition.

It is understood that the general specifications, which are subject to cor-ection so far as pipe is concerned, are as follows:

2525 ft. 20″ O. D. ⅜ in. pipe to be threaded, coupled or flanged as per detail drawings to be furnished us prior to Sept. 1st.

1300 ft. 15″ O. D. ⅜ in. pipe, with the option of 2230 ft., but notice to be given us on or before August 20th, to be threaded, coupled or flanged as per detail drawings to be furnished us prior to Sept. 1st.

2700 ft. 12″ Standard Merchants Pipe, threaded and coupled
2300 ft. 10″ " " " " "
3300 ft. 8″ " " " " "
2500 ft. 3″ Galvanized Pipe.
1300 ft. 2½″ " "
2700 ft. 2″ " "
3500 ft. 1″ " "

In reference to the 12 in. 10 in. and 8 in. pipe, will say that on or before August 20th, you are to give us correct detailed specifications as to quantities, as we understand this may be increased or decreased.

It is understood that the 12 in. and under is to be shipped immediately upon receipt of detailed specifications, and that the 15 in. and 20 in. is to be delivered not later than October 1st, 1902.

34 Terms of payment,—usual.

Respectfully submitted,

JAMES B. CLOW & SONS,
By H. S. COLLINS.

Accepted this 13th day of August, 1902.

MERCHANTS HEAT & LIGHT COMPANY,
By W. H. SCHOTT, *General Manager.*"

And thereupon the said court overruled said motion to quash, and thereafter, upon motion made by the defendant in said action, the said order overruling motion to quash, was set aside and leave given to said defendant to re-file the said motion.

And thereafter, to-wit: on the twenty-ninth day of July, A. D. 1903, the court again entered the following order, to-wit:

"UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT COMPANY.

The order entered in the above entitled cause, filed of record under date of July 10th, 1903, which order being in substance as follows:

"Upon application of the defendant herein, leave is hereby given to said defendant to re-file the motion heretofore made to quash the service in said cause, and the order heretofore entered requir-
35 ing the defendant to plead is set aside until the further order of this court" is hereby set aside, and the motion to quash service refiled by leave of said order of July 10th, 1903, is hereby overruled and the defendant is ordered to plead or demur to the plaintiff's declaration filed herein within thirty days.

WM. H. SEAMAN, *Judge.*"

Dated July 29, 1903.

in said cause, to which action of the court in overruling the motion to quash said summons and retaining jurisdiction in said cause the defendant then and there excepted, and asked and obtained leave within thirty days to file its said bill of exceptions to the action of the court herein.

And forasmuch as the facts and the decision of the court thereon do not appear of record, the defendant prays that this its Bill of Exceptions may be allowed.

Allowed and settled this 27th — of Aug., 1903.

WM. H. SEAMAN, *Judge.*

And the defendant was then ruled to answer, and thereupon, on the tenth day of April, 1905, it was stipulated between the parties as follows, to-wit:

"In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

No. 26678.

JAMES B. CLOW & SONS
*vs.*
MERCHANTS HEAT & LIGHT CO.

It is hereby stipulated by and between the parties to the above entitled cause that a jury may be waived therein, and the said cause be submitted to the court for trial without the intervention of a jury;

36 And it is further stipulated between the parties hereto that this stipulation is made, and any order of court entered thereon shall be, without prejudice to the defendant to present and raise before the court the question of jurisdiction which has been heretofore presented in this cause.

NEWTON WYETH,
*Attorney for Plaintiff,*
CHARLES H. ALDRICH,
*Attorney for Defendant.*

And thereupon said case was submitted to the court for trial as per said written stipulation of counsel, without the intervention of a jury, with the request that the court make findings of fact and conclusions of law.

And thereupon, on the 31st day of August, 1905, in accordance with said stipulation, the court made, and filed, its findings of fact and conclusions of law, in words and figures as follows, to-wit:

"United States Circuit Court, Northern District of Illinois, Northern Division.

JAMES B. CLOW & SONS, Plaintiff,
*vs.*
MERCHANTS HEAT & LIGHT COMPANY, Defendant.

This action comes on to be tried by the court without a jury, on May 23, 1905, the parties having stipulated in writing that a 37 trial by jury should be waived, Newton Wyeth, Warren B. Wilson and Walter L. Fisher appearing for the plaintiff and Charles H. Aldrich for the defendant, and the court having heard the evidence and the cause having been argued by counsel, the following findings of law and fact are made and filed by the court this 31st day of August, 1905.

### *Findings of Facts.*

*1.* For the last ten years William H. Schott has been a contractor and civil engineer, doing business and residing at Chicago, making a specialty of organizing corporations for heating and lighting pur-

poses, and designing and building plants under contracts with such corporations. From 1899 to the present time said Schott has maintained a business office in the Marquet-e Building, Chicago, designated William H. Schott, Engineer and Contractor, having his own name on its door, and for which he paid the rent. Defendant was organized as an Indiana corporation prior to August, 1902, for the purpose of building and operating a plant for the furnishing of heat, light and power in Indianapolis, Indiana, and being purely a local corporation of that state. On August 7, 1902, defendant and said Schott made a written contract, by which Schott agreed to construct, install and equip its plant, purchase all materials and apparatus necessary thereto, employ all necessary labor, at the best possible terms for defendant, personally superintend such construc-
38 tion, assume general management of the plant, and operate
it for the company until fully completed, secure all business for the plant, approve contracts therefor, institute a system of bookkeeping, certify bills, have the heating plant ready for service December 1, 1902, and finally finished on or before July 1, 1903; and to pay as liquidated damages fifty dollars for each day that steam was not provided for customers after December 1, 1902. The company was to pay Schott for the plant $275,079.38, including his compensation, which was to be ten per cent. of all bills for construction. Said Schott continued to be the general manager of defendant until July, 1903, this suit having been commenced March 23, 1903, by service of summons on said Schott at his office in Chicago. At this time the construction of the plant had not been entirely completed. Said Schott was still acting as general manager as to such construction, and any business of defendant required to be done in Illinois, such as the purchase of cables, engines, boilers, generators, pipes, fittings and other supplies for the extension of the plant, was done for defendant by said Schott as general manager, down to a time later than the beginning of this action. On Aug. 13, 1902, the contract in suit was made between plaintiff and said Schott as such general manager.

Section 5 of chapter 110, of the Statutes of Illinois, provides that a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Defendant never has maintained any office or had any property in
39 Cook County, Illinois, nor has it had any business therein
except such as it has done through its said general manager.

The city of Chicago was and is the principal market for supplies of the kind sold by plaintiff to defendant, and of the kind enumerated in this finding. A modification of the contract of August 13, 1902, by which flanges on the pipe were substituted for coupling and thread fastenings, was made between the plaintiff and said Schott, as general manager of defendant, in the city of Chicago. All business relating to the execution of said contract, except what was done by correspondence, was had at the office of said Schott in Chicago, and by him on behalf of defendant.

About the first of January, 1903, a controversy arose between the parties in respect to the final payment under said contract, and the right of defendant to set off damages for delay in the delivery of the pipe contracted to be sold to defendant, and frequent interviews were had at the office of said Schott in Chicago between him as general manager of defendant and the agents or attorneys for the plaintiff in respect to the adjustment of the controversy.

*2.* On August 13, 1902, the plaintiff, an Illinois corporation, entered into a contract with defendant for the pipe necessary in the construction of its plant, at prices which amount, as claimed by the plaintiff, to the sum of $33,933.84. Such contract provided 40 that defendant should furnish detail drawings of the 15 and 20 inch pipe prior to September 1, 1902, and specifications of the balance of the pipe August 20, 1902; and it was agreed that the 12 inch pipe should be shipped immediately on receipt of specifications, and the 15 and 20 inch pipe was to be delivered not later than October 1, 1902. All the negotiations leading up to the making of the contract of August 13, 1902, were had at the office of said Schott in Chicago, defendant being therein represented by him. Said contract was entered into in Chicago, was in all respects an Illinois contract, and was signed on behalf of defendant by said Schott as general manager.

Defendant has paid upon the contract $24,833.63, leaving a balance as claimed by plaintiff, of $9,417.37, less freight paid by defendant of $316.17.

*3.* During the negotiations leading up to the contract of August 13, 1902, the plaintiff was informed by said Schott that the time of delivery of the material contracted for would enter into the relations of the parties as much as the price, and that defendant must have the material by a certain date in order to deliver heat by December 1, 1902; and that, for that reason, the contract should be made without any provision excepting delays from strikes, car shortages and other like causes of delay. The contract of August 13, 1902, fixing the time of delivery of the 15 and 20 inch pipe not later than October 1, 1902, was made with direct reference to any and all damages which the defendant might suffer consequent upon a failure of delievery at the time specified.

41 *4.* Before making any general appearance the defendant appeared specially and moved the court, upon the record and certain affidavits appearing in the bill of exceptions settled by the court August 27, 1903, to quash the return of service made by the marshal, on the ground that the defendant was a foreign corporation, and had no business, office, place of business or agency in Illinois. Said motion was denied by the court July 29, 1903, and an order entered requiring defendant to plead or demur to the declaration within thirty days. Accordingly, and on August 10, 1903, defendant pleaded the general issue, together with a notice of set off claiming damages in the sum of $15,000 by reason of plaintiff's failure to furnish the 15 and 20 inch pipe until some time after the first day of October, 1902.

Afterwards, and on December 3, 1903, defendant filed a bill of particulars of certain overcharges claimed by it to have been made by plaintiff, and the damages claimed by it by reason of delay in furnishing pipe, as follows:

*Overcharges Claimed.*

| | |
|---|---|
| Oct. 16, 1902, overcharge on 15 inch pipe............ | $197 26 |
| " 20 " do. ............ | 144.31 |
| (Paid by defendant Nov. 8, 1902) | |
| Nov. 5, 1902, overcharge on 20 inch pipe............ | 213.57 |
| " " " do. ............ | 219.77 |
| " 8 " do. ............ | 204.73 |
| " 12 " do. ............ | 234.04 |
| (Paid by defendant Nov. 21, 1902) | |
| Increased cost of purchase of 72 feet 20 inch pipe over contract price .................................. | 18.00 |

42 *Damages for Delay.*

| | |
|---|---|
| Expense of refilling and re-excavating trench and extra barricades due to failure to furnish above 72 ft...... | 210.00 |
| Increased cost of laying 2325 ft. of 15 and 20 inch pipe after frost in Dec., Jan. and Feb., at $2.75 per foot.... | 6,393.75 |
| Additional premiums for liability insurance........... | 575.83 |
| Additional expense for Supt. and foreman............ | 1,055.00 |
| Estimated loss on contracts for heat.................. | 6,608.10 |
| Estimated loss on contracts for light and power........ | 4,757.53 |
| Total .................................. | $20,831.89 |

*5.* No 15 or 20 inch pipe was delivered to defendant by plaintiff until about the middle of November, 1902, and the last delivery was not made until January, 1903. Defendant commenced delivery of heat under contracts with its customers December 31, 1902, but only on part of the line of its plant.

*6.* The contract between the parties provides that the price of the 15 inch pipe to be furnished shall be $3.32 if furnished in standard or "random" lengths, as it comes from the mill, without being cut to any special length, but if cut to fit any specified place the price shall be $3.61. It also provides that the price of the 20 inch pipe, random lengths, shall be $4.48 and if cut shall be $4.67. According to the blue print furnished August 28, 1902, it was not necessary to cut all of the pieces of pipe, but only single pieces in 43 the separate sections of the work, between certain points where several lengths were required, leaving the other pieces in such sections standard length. I do not determine whether the larger or smaller price is the one proper to be charged, in view of the facts found in paragraph 9 hereof, to the effect that the bill for the larger amount was paid without objection. It is further found that plaintiff and defendant by their conduct construed the contracts as justifying the charges made by plaintiff.

*7.* The specifications and drawings furnished by defendant August 28, 1902, included all of the 15 and 20 inch pipe except four lengths of 20 inch pipe and a small amount of 15 inch pipe. A drawing showing the four lengths of 20 inch pipe was furnished on the 10th day of November, 1902, and the specifications of the 15 inch pipe not furnished August 28th were furnished September 15, 1902. I do not find, however, that the delay in furnishing these specifications had any effect in postponing the delivery of other pipe covered by the drawings furnished August 28, 1902, some of which was not delivered until January, 1903, and none of which was delivered until about the middle of November, 1902.

*8.* Notwithstanding the delay in the delivery of the 15 and 20 inch pipe, deliveries thereof were received from time to time by defendant after the time stipulated in the contract, without objection.
and without any notice or intimation to plaintiff that any
44 damages for delay would be claimed, until January 10, 1903;
but the said Schott had several times prior thereto urged plaintiff to hurry such deliveries. On December 29, 1902, the said Schott and William E. Clow, vice president and managing agent of plaintiff, met by previous arrangement at the office of said Schott in Chicago to discuss the question of final payment under the contract, in which conversation said Schott promised to pay the whole balance claimed by plaintiff to be due on the contract except the final invoice of about $1200 value, which had not then been received, not later than January, 1903. At this time said Schott made no claim whatever for damages for delay in furnishing the pipe, but informed said Clow that defendant would not pay for such final installment until a claim made by defendant that some of the pipe was so bent that it could not be laid without extra expense should be adjusted. Such claim is not made in the bill of particulars, and has either been adjusted or abandoned.

*9.* Bills for the pipe claimed by defendant to have been standard or random length were presented and paid by defendant without the attention of Mr. Schott being particularly called to the fact that the pipe was billed and charged for as cut pipe at the higher price mentioned in finding 6. After his attention was called to the fact he did not make claim for deduction or reimbursement for about a year, long after this suit was begun, and not until December 8, 1903.

45 *10.* That through some mistake plaintiff did not furnish sufficient 20 inch pipe, as required by the drawings, and defendant was obliged to purchase seventy two feet of such pipe, at an increased cost of eighteen dollars over the contract price, which excess should be allowed to defendant.

*11.* The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for increased cost in making excavations for laying of pipe or pipe and fittings.

*12.* The court finds that there is not sufficient evidence in this case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for additional expense for Superintendent and Foreman.

*13.* The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for additional premium for liability insurance paid by the defendant as alleged by it.

*14.* The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for increased expense of refilling and excavating trench for the laying of certain seventy-two feet of pipe as alleged by the defendant.

46 *15.* The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for loss on account of contracts for heating.

*16.* The court finds that there is not sufficient evidence in the case to sustain the claim of the defendant for damages as claimed by it and sought to be set off or allowed to it in this suit for loss on account of contracts for light and power.

*17.* The court finds from the evidence in the case that the plaintiff sold and delivered to the defendant iron pipe, fittings and material, for which the plaintiff seeks to recover herein of the value and of the agreed price of Nine Thousand four hundred seventeen dollars and thirty-seven cents ($9,417.37), from which is to be deducted Three hundred seventeen dollars and sixteen cents ($317.16) and eighteen dollars ($18.), leaving a balance of Nine Thousand eighty-two dollars and twenty-one cents ($9,082.21); and that the amount of said balance was due and unpaid at and before the bringing of this suit; and that the same remains unpaid.

## *Conclusions of Law.*

*1.* Defendant was during all the time from August 12, 1902, to the commencement of suit, doing business in Chicago, Illinois, and during all that time William H. Schott was its general managing agent. Service of summons was properly made upon him, as such agent. 47

*2.* By claiming of plaintiff in the bill of particulars a sum greater than the amount of plaintiff's claim defendant became in effect a plaintiff, thus invoking the jurisdiction of the court in its behalf, and thereby waiving its right to be sued in Indiana, and not in Illinois.

*3.* The delay in furnishing detailed drawings or specifications of pipe was without injury to the plaintiff, and immaterial.

*4.* By its conduct defendant waived all right to damages for not furnishing the 15 and 20 inch pipe at the time stipulated in the contract.

*5.* Defendant waived its right to possible reimbursement for overcharges on pipe by reason of the facts found in paragraphs six and nine of the findings of facts.

6. At the time of beginning suit defendant was indebted to plaintiff for material delivered under the contract of August 13, 1902, in the sum of nine thousand eighty two dollars and twenty-one cents, and judgment therefor is hereby directed in favor of the plaintiff and against the defendant, with costs. 48

By the Court,

ARTHUR L. SANBORN, *Judge.*

Dated Aug. 31, 1905.

(Endorsed:) Filed Aug. 31, 1905. Marshall E. Sampsell, Clerk.

To each of which findings of fact and conclusions of law the defendant then and there took exception; and made a motion for a new trial, which was by the court overruled. And thereupon, to-wit: on the sixth day of September, 1905, the court entered judgment upon said findings of fact and conclusions of law, in favor of the plaintiff and against the defendant, in the sum of nine thousand eighty-two dollars and twenty-one cents, according to the findings of fact.

And thereupon the defendant gave notice of its intention to take the said case to the Supreme Court of the United States, upon the question of jurisdiction only, and asked, and obtained, leave to file its petition for writ of error, bond, with approved security, in the sum of twelve thousand dollars, assignment of errors and bill of exceptions, within fifteen days from the said sixth day of September, 1905.

And as these matters do not fully appear in the record, this bill of exceptions is signed and attested this 18th day of September, A. D. 1905.

A. L. SANBORN, *Judge.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

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49 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. At Law.

MERCHANTS HEAT & LIGHT COMPANY, Plaintiff in Error,

*vs.*

CLOW & SONS, Defendant in Error.

### *Petition for Writ of Error.*

And now comes Merchants Heat & Light Company, plaintiff herein, and says, that on or about the sixth day of September, 1905, the circuit court entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ALDRICH & McAULEY,
CHARLES H. ALDRICH,
*Attorneys for Plaintiff in Error.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

---

50 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. At Law.

CLOW & SONS, Plaintiff,
*vs.*
MERCHANTS HEAT & LIGHT COMPANY, Defendant.

### *Assignment of Errors.*

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

*1.* The court erred in taking jurisdiction in said cause.

*2.* The court erred in holding that William H. Schott occupied such relations to the defendant that he could subject it to this court's jurisdiction, when engaged in the prosecution of his own business in his own office in Chicago.

51 *3.* The court erred in holding that by claiming in the bill of particulars a sum greater than the amount of plaintiff's claim, the defendant became in fact a plaintiff, and thus invoked the jurisdiction of the court in its behalf, and thereby waived its right to be sued in Indiana, and not in Illinois.

For which manifest errors the plaintiff in error and defendant prays that the judgment be reversed, and said cause be dismissed.

CHARLES H. ALDRICH,
ALDRICH & McAULEY,
*Attorneys for Defendant and Plaintiff in Error.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

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52 Know all men by these presents, that we, Merchants Heat & Light Company, a corporation, as principal, and the American Fidelity Company, of Montpelier, Vt., as surety, are held and firmly bound unto James B. Clow & Sons in the full and just sum of twelve thousand dollars ($12,000.), to be paid to the said James B. Clow & Sons, *their* certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of September, A. D. 1905.

Whereas, lately at a circuit court of the United States, in a suit depending in said court, between James B. Clow & Sons, plaintiff, and Merchants Heat & Light Company, defendant, a judgment was rendered against the said Merchants Heat & Light Company, and the said Merchants Heat & Light Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James B. Clow & Sons, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the ninth day of October next, 1905.

Now, the condition of the above obligation is such that if the said Merchants Heat & Light Company shall prosecute said writ
53 of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] MERCHANTS HEAT & LIGHT COMPANY,
By EDW'D L. McKEE, *Pres't.* President.

Attest: FREDERIC McAYRES, *Secretary.*

[SEAL.] AMERICAN FIDELITY COMPANY,
By S. N. CHAMBERS,
*Resident Vice-President.*
N. C. VETTE, *Resident Secretary.*

I hereby waive service of citation on Writ of Error secured by the above bond.

NEWTON WYETH,
*Attorney for James B. Clow & Sons,*
*Defendants in Error.*

Approved as to form and sufficiency of surety.

A. L. SANBORN, *Judge.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

54 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. At Law.

CLOW & SONS, Plaintiff,
*vs.*
MERCHANTS HEAT & LIGHT COMPANY, Defendant.

This 18th day of September, 1905, comes the defendant by its attorneys, and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, and it appearing to the court that a bond, conditioned according to law, in the sum of twelve thousand dollars, has been filed, the court does allow the writ of error, and orders that the said bond shall operate as a supersedeas bond.

A. L. SANBORN, *Judge.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk

55 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

No. 26678.

James B. Clow & Sons
*vs.*
Merchants Heat & Light Company.

This is to certify that in this cause the defendant moved to quash the service of process herein on the ground that the service upon William H. Schott was not such as entitled the plaintiff to proceed against it in this jurisdiction, and in support thereof filed certain affidavits, while to support the jurisdiction of the court, the plaintiff filed also certain affidavits and other papers, all of which more fully appears by the bill of exceptions filed herein and made part of this record.

The question of jurisdiction was again heard upon final hearing before the court, without the intervention of a jury, in accordance with the written stipulation of counsel for the respective parties, and was passed upon by the court, as will more fully appear by the findings of fact and conclusions of law, as reduced to writing and filed in said cause, and preserved by bill of exceptions herein.

56 The writ of error is asked for, and allowed, to the Supreme Court of the United States solely upon the said questions of jurisdiction, which are:

*1.* Were William H. Schott's relations to the defendant company such that service upon him in Chicago constituted service upon the defendant, an Indiana corporation, in the Northern District of Illinois?

*2.* Was the filing of the counter-claim by the defendant a waiver of the jurisdictional question, and to be properly construed as a submission to the jurisdiction of said court?

A. L. SANBORN, *Judge.*

Attest: MARSHALL E. SAMPSELL, *Clerk.*

(Endorsed:) Filed Sep. 18, 1905. Marshall E. Sampsell, Clerk.

57 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States of America of the Seventh Judicial Circuit in and for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record and proceedings in the above entitled cause, including the præcipe, summons and return, declaration, petition and notice of set off, bill of particulars, stipulation waiving jury, judgment of September 6th, 1905, bill of exceptions, petition for writ of error, assignments of error, bond on writ of error, order allowing writ of error and certificate of jurisdictional questions involved as per præcipe for record filed herein and as the same remain of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court this 20th day of September A. D. 1905.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
*Clerk of United States Circuit Court, Northern*
*District of Illinois.*

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between James B. Clow & Sons, a corporation etc., plaintiff and Merchants Heat & Light Company, a corporation etc., a manifest error hath happened, to the great damage of the said defendant, Merchants Heat & Light Company, a corporation, etc., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of September, in the year of our Lord one thousand nine hundred and five.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
*Clerk of the Circuit Court of the United States*
*for the Northern Dist. of Illinois.*

Allowed:
ARTHUR L. SANBORN, *Judge.*

59 [Endorsed:] Supreme Court of the United States. James B. Clow & Sons, a corporation, *vs.* Merchants Heat & Light Company, a corporation. Writ of Error. Copy deposited for the defendant in error in the Clerk's Office, U. S. Circuit Court, Northern District of Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause prepared in accordance with the præcipe filed by the defendant therein this 20th day of September A. D. 1905.

MARSHALL E. SAMPSELL,
*Clerk of United States Circuit Court, Northern*
*District of Illinois.*

Endorsed on cover: File No. 19,910. N. Illinois C. C. U. S. Term No. 118. Merchants Heat & Light Company, plaintiff in error, *vs.* James B. Clow & Sons. Filed September 22d, 1905. File No. 19,910.

# FILE COPY.

IN THE

# SUPREME COURT OF THE UNITED STATES

Merchants' Heat and Light Company, *Plaintiff in Error,*

*v*

James B. Clow & Sons, *Defendants in Error.*

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No. 118.

October Term, 1906.

*IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.*

✓W. H. H. Miller,
*Attorney for Plaintiff in Error.*

James W. Fesler,
✓ C. C. Shirley,
Samuel D. Miller,
*Of Counsel.*

The Hollenbeck Press, Indianapolis

IN THE

# SUPREME COURT OF THE UNITED STATES

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Merchants' Heat and Light Company, *Plaintiff in Error,*

*v.*

James B. Clow & Sons, *Defendants in Error.*

---

No. 118.

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October Term, 1906.

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*IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.*

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## Brief for Plaintiff in Error.

The only question for decision in this case is one of jurisdiction.

## Statement of Facts.

The facts upon which the question depends are set forth in a special finding of facts made by the court, the trial having been by the court without a jury.

Those facts as stated in the language of the court are in the transcript, on p. 23, and are as follows:

"For the last ten years William H. Schott has been a contractor and civil engineer, doing business and residing at Chicago, making a specialty of organizing corporations for heating and lighting purposes, and designing and building plants under contracts with such corporations. From 1899 to the present time said Schott has maintained a business office in the Marquette building, Chicago, designated William H. Schott, Engineer and Contractor, having his own name on its door, and for which he paid the rent. Defendant was organized as an Indiana corporation prior to August, 1902, for the purpose of building and operating a plant for the furnishing of heat, light and power in Indianapolis, Indiana, and being purely a local corporation of that state. On August 7, 1902, defendant and said Schott made a written contract, by which Schott agreed to construct, install and equip its plant, purchase all materials and apparatus necessary thereto, employ all necessary labor, at the best possible terms for defendant, personally superintend such construction, assume general management of the plant, and operate it for the company until fully completed, secure all business for the plant, approve contracts therefor, institute a system of bookkeeping, certify bills, have the heating plant ready for service December 1, 1902, and finally finished on or before July 1, 1903; and to pay as liquidated damages $50 for each day that steam was not provided for customers after December 1, 1902. The company was to pay Schott for the plant, $275,079.38, including his compensation, which was to be ten per cent. of all bills for construction. Said Schott continued to be the general manager of defendant until July, 1903, this suit having been commenced March 23, 1903, by service of summons on said Schott at his office in Chicago. At this time the construction of the plant had not been entirely completed. Said Schott was still acting as general manager as to such construction, and any business of defendant required to be done in Illinois, such as the purchase of cables, engines, boilers, generators, pipes, fittings and other supplies for the extension of the plant, was done for defendant by said Schott as general manager down to a time later than the beginning of this action. On August 13, 1902, the contract in suit was made between plaintiff and said Schott as such general manager.

Section 5 of chapter 110 of the statutes of Illinois provides that a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Defendant never has maintained any office or had any property in Cook county, Illinois, nor has it had any business therein except such as it has done through its said general manager. The city of Chicago was and is the principal market for the supplies of the kind sold by plaintiff to defendant, and of the kind enumerated in this finding. A modification of the contract of August 13, 1902, by which flanges on the pipe were substituted for coupling and thread fastenings, was made between the plaintiff and said Schott, as general manager of defendant, in the city of Chicago. All business relating to the execution of said contract, except what was done by correspondence, was had at the office of said Schott in Chicago, and by him on behalf of defendant.

About the first of January, 1903, a controversy arose between the parties in respect to the final payment under said contract, and the right of defendant to set off damages for delay in the delivery of the pipe contracted to be sold to defendant, and frequent interviews were had at the office of said Schott in Chicago between him, as general manager of defendant, and the agents or attorneys for the plaintiff in respect to the adjustment of the controversy.

2. On August 13, 1902, the plaintiff, an Illinois corporation, entered into a contract with defendant for the pipe necessary in the construction of its plant, at prices which amount, as claimed by the plaintiff, to the sum of $33,933.84. Such contract provided that defendant should furnish detail drawings of the 15 and 20 inch pipe prior to September 1, 1902, and specifications of the balance of the pipe August 20, 1902; and it was agreed that the 12-inch pipe should be shipped immediately on

receipt of specifications, and the 15 and 20 inch pipe was to be delivered not later than October 1, 1902. All the negotiations leading up to the making of the contract of August 13, 1902, were had at the office of said Schott in Chicago, defendant being therein represented by him. Said contract was entered into in Chicago, was in all respects an Illinois contract, and was signed on behalf of the defendant by said Schott as general manager.

Defendant has paid upon the contract $24,833.63, leaving a balance, as claimed by plaintiff, of $9,417.37, less freight paid by defendant of $316.17.

4. Before making any general appearance the defendant appeared specially and moved the court, upon the record and certain affidavits appearing in the bill of exceptions settled by the court August 27, 1903, to quash the return of service made by the marshal on the ground that the defendant was a foreign corporation, and had no business, office, place of business or agency in Illinois.

Said motion was denied by the court July 29, 1903, and an order entered requiring defendant to plead or demur to the declaration within thirty days. Accordingly and on August 10, 1903, defendant pleaded the general issue, together with a notice of set off, claiming damages in the sum of $15,000 by reason of plaintiff's failure to furnish the 15 and 20 inch pipe until some time after the first day of October, 1902.

Afterward, and on December 3, 1903, defendant filed a bill of particulars of certain overcharges claimed by it to have been made by plaintiff, and the damages claimed by it by reason of delay in furnishing pipe as follows:

### OVERCHARGES CLAIMED.

| | |
|---|---|
| Oct. 16, 1902, overcharge on 15-inch pipe.... | $197 26 |
| Oct. 20, 1902, overcharge on 15-inch pipe.... | 144 31 |
| (Paid by defendant Nov. 8, 1902.) | |
| Nov. 5, 1902, overcharge on 20-inch pipe.... | 213 57 |
| Nov. 5, 1902, overcharge on 20-inch pipe.... | 219 77 |
| Nov. 8, 1902, overcharge on 20-inch pipe.... | 204 73 |
| Nov. 12, 1902, overcharge on 20-inch pipe... | 234 04 |
| (Paid by defendant Nov. 21, 1902.) | |
| Increased cost of purchase of 72 feet 20-inch pipe over contract price................. | 18 00 |

## DAMAGES FOR DELAY.

| | |
|---|---|
| Expense of refilling and re-excavating trench and extra barricades due to failure to furnish above 72 feet...................... | $210 00 |
| Increased cost of laying 2,325 feet of 15 and 20 inch pipe after frost in December, January and February at $2.75 per foot........ | 6,393 75 |
| Additional premiums for liability insurance.. | 575 83 |
| Additional expense for superintendent and foreman ............................ | 1,055 00 |
| Estimated loss on contracts for heat......... | 6,608 10 |
| Estimated loss on contracts for light and power ............................ | 4,757 53 |
| Total ......................... | $20,831 89 |

Upon these facts the court stated its conclusions of law, 1 and 2, as follows:

1. Defendant was, during all the time from August 12, 1902, to the commencement of suit, doing business in Chicago, Illinois, and during all that time William H. Schott was its general managing agent. Service of summons was properly made upon him, as such agent.

2. By claiming of plaintiff in the bill of particulars a sum greater than the amount of plaintiff's claim defendant became in effect a plaintiff, thus invoking the jurisdiction of the court on its behalf, and thereby waiving its right to be sued in Indiana, and not in Illinois.

3. The delay in furnishing detailed drawings or specifications of pipe was without injury to the plaintiff, and immaterial.

4. By its conduct defendant waived all right to damages for not furnishing the 15 and 20 inch pipe at the time stipulated in the contract.

5. Defendant waived its right to possible reimbursement for overcharges on pipe by reason of the facts found in paragraphs six and nine of the findings of facts.

6. At the time of beginning suit defendant was indebted to plaintiff for material delivered under the contract of August 13, 1902, in the sum of nine thousand eighty-two dollars and twenty-one cents, and judgment therefor is hereby directed in favor of the plaintiff and against the defendant, with costs.

By the Court. ARTHUR L. SANBORN, Judge.
Dated August 31, 1905.
(Endorsed) Filed August 31, 1905.
MARSHALL E. SAMPSELL, Clerk."

## ERRORS RELIED ON.

The assignment of errors is on page 30 of the printed transcript, and is in three specifications, as follows:

"The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

1. The court erred in taking jurisdiction in said cause.
2. The court erred in holding that William H. Schott occupied such relations to the defendant that he could subject it to this court's jurisdiction, when engaged in the prosecution of his own business in his own office in Chicago.
3. The court erred in holding that by claiming in a bill of particulars a sum greater than the amount of plaintiff's claim, the defendant became in fact a plaintiff, and thus invoked the jurisdiction of the court on its behalf, and thereby waived its right to be sued in Indiana, and not in Illinois.

For which manifest errors the plaintiff in error and defendant prays that the judgment be reversed, and said cause be dismissed.

Charles H. Aldrich,
Aldrich & McCauley,
*Attorneys for Defendant and Plaintiff in Error.*
(Endorsed) Filed September 18, 1905.
Marshall E. Sampsell, Clerk."

Perhaps the entire error is covered by the first specification, viz.:

"The court erred in taking jurisdiction in said cause."

The sole question for consideration is: Was Schott the agent for the defendant and doing business for defendant in Chicago in such a sense as that service of process on him was service on the company defendant?

With reference to this question our contentions are two-fold:

First. While Schott was buying material to be used in the construction of defendants' plant, which was purely local, at Indianapolis, and while he was using the credit of the company in making such purchases, yet he was, in fact, an independent contractor, and as between him and the plaintiff, the latter was his surety only. (Transcript, p. 24.)

It there appears that he, Schott, agreed for a stipulated sum, $275,079.38, to construct and set in operation the entire plant at Indianapolis, he furnishing all materials. He was therefore buying these materials for himself. He was doing business in making the purchases directly for himself—and only remotely, if at all, for the defendant, which in fact was doing no business in Chicago, but at most was allowing the use of its name to its contractor by way of surety, or to give him credit.

Second. The mere purchasing of materials or other work he is found to have been doing in this matter in Chicago was not "doing business" for defendant in Illinois in the sense of the statute and decisions necessary to give jurisdiction.

What is meant by that statute is, it is submitted, that the foreign corporation is doing some part of the business it was organized to carry on, some part of the business which it has no right to do in a foreign state except by the procuring a license so to do.

## ARGUMENT.

We address ourselves to the second question first. Indeed, the two are so closely intertwined that they may be discussed together. The Illinois Practice Act (Rev. St. 1897, p. 109, section 5) provides that process against a corporation shall be served upon the president, or, if he does not reside in the county, or is absent therefrom, then by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor or agent of the company found in the county.

This has been held to apply to foreign corporations.

It has been held, however, by this court, that in order to authorize such service on an "agent" of a foreign corporation found within the state such agent must be there doing business for his corporation; and that such service, even upon the president of the foreign corporation, who is in the state in which the suit is brought, but not there prosecuting the business of the corporation, is not good service.

*Goldey* v. *Morning News,* 156 U. S. 518.

A case still more directly in point is *Conley* v. *Matheson Alkali Works,* 190 U. S. 406.

In that case the plaintiff, a citizen of New York, was suing, in a state court of New York, the defendant, a corporation of Virginia. The defendant had designated no agent upon whom service could be made in New York. Two of its directors, however, were residents of New York, and service was made on one of them April 18, 1901, as the New York statute provided might be done. The case was removed to the U. S. Circuit Court.

The defendant, in December, 1900, sold the plant and property to another Virginia corporation, but it appeared from the evidence, and was found by the master, that the by-laws of the defendant provided for the holding of the meetings of the board of directors in the city of New York; and that at least two or three such meetings were held in the city of New York in 1901.

Upon this state of facts (in addition to the fact that defendant held the entire capital stock of the Virginia corporation to which it had sold out) it was held that defendant was not doing business in New York so as to justify service on one of its directors.

Another case holding that in addition to being the agent, that agent must be engaged about the business of his company in order to authorize service upon him, is

*Lumberman Ins. Co.* v. *Myer,* 197 U. S. 407.

This, then, may be regarded as settled. It is not enough that one be an officer of the company or an agent; but he must be an officer or agent engaged in the business of the company in the state where the service is sought to be made effective.

The question then arises in what *kind* of business of the company he must be engaged.

It is evident from the cases already cited that not every transaction in the state in the way of business will authorize service.

Thus an Indiana corporation, engaged in the dry goods business in that state, which, by an agent, should buy a bolt of calico in New York or Chicago, would not be held to be engaged in business in either of the latter states in such a sense as to justify service.

So it is submitted that the defendant, by buying through an agent in New York a pump from H. R. Worthington, or in Pittsburg an engine from Westinghouse, would not be doing business to warrant such service, especially if, as in the case at bar, the only purchases were for the purpose of launching or equipping the corporation, nor is it believed that a dozen such purchases for a like purpose would have such an effect.

On the contrary, it is believed that the solution of the question does not depend on the number of purchases, but on the kind of business done. And it is submitted that the business done must be something in the line of that for which the corporation was organized. That is, for instance, if the corporation is a bank to be operated solely in Indianapolis, it is not believed that the buying of a safe or other office furniture in New York would be doing business within the meaning of the law; or, if it is a local corporation for the manufacturing of furniture, that the purchase of the necessary planers, saws and other equipment for the plant would subject it to service in a foreign state; or, if it is an insurance company, that the buying of books, office desks, etc., would bring it within the law; or, if it is a purely local street railroad to be operated only in Indianapolis, that the sending of an agent to Dayton or St. Louis to buy cars, or to Pittsburg to buy motors would constitute doing business in either of those states within the meaning of the law.

If, however, the bank should in the foreign state establish an office for the doing of any part of its banking business; if the furniture company should in the foreign state have agencies for the transaction of any part of its business, as for the sale of its furniture, for instance; or the street railroad company should establish in New York a fiscal agency, then a very different proposition would be presented.

If a test of this kind is made, dependent on the *kind* of business done, then a rule or principle is established which can be readily applied by all courts, and decisions will be harmonious.

All states, including Illinois, have statutes requiring foreign corporations to take out licenses and designate an agent on whom service may be made before they can be permitted to do business in the state.

(Laws of Illinois 1899, p. 118.)

Section two of this act reads as follows:

Section 2. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business therein, if already established, shall designate some person as its agent or representative in this state on whom service of legal process may be had if desired; shall have and maintain a public office or place in this state for the transaction of its business, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporations shall be subjected to all liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign corporation established or maintained in any way for pecuniary profit of its stockholders or members shall engage in any business other than that expressly authorized in its charter, or the laws of this state under which it may come, nor shall it hold any real estate except such as may be necessary and proper for carrying on its legitimate business. And no corporation incorporated under the laws of any other state, territory or country, doing business in this state, shall be permitted to mortgage, pledge or otherwise encumber its real or personal property situated in this state to the injury or exclusion of any citizen or corporation of this state who is a creditor of such foreign corporation. And no mortgage by a foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state until all its liabilities due to any person or corporation in this state at the time of recording such mortgage have been paid and extinguished.

The next section provides that the corporations shall file with the secretary of state a copy of its articles of incorporation, and a statement of the proportionate part of its capital used in its business in Illinois, and pay certain franchises, taxes, etc.

The fourth section imposes severe penalties for a failure to comply with this law.

It is submitted that the business necessary to authorize service of summons is the kind of business contemplated by this statute. It certainly does not wrong the state to hold that it has here defined the business which makes an agent liable to service. Will any one argue that the making of such purchases as were made, or the doing the things that were done, as shown in the special findings in this case, without a compliance with this statute, rendered appellant amenable to the penalties prescribed by section four of this act?

As has been already stated, if a test bottomed on the character of the business is applied, there will be some certainty and uniformity in the decisions. If, however, it is held that an agent is "engaged in the business" of his company because he is making miscellaneous purchases with a view to equipping his company to enter business, or having sporadic transactions in such state not a part of the business the company was created to do—and not contemplated by the law of such foreign state for licensing such corporations—then there can be no certainty or uniformity of decision, but every judge will make a rule for himself.

Nor is it to be overlooked that it may well be held that a manufacturer or merchant who is selling its product or his merchandise in a foreign state stands upon a very different footing from another corporation which buys in a foreign state materials to be used, not in the common course of its business proper, but only for the purpose of furnishing and equipping its plant to enable it to enter upon and prosecute its business—business which it only has a right to prosecute in a foreign state after procuring a license therefor.

Beyond question, as heretofore suggested, the Merchants' Heat and Light Company had a right to go to Chicago and purchase supplies such as it did purchase there, without taking out any license under the statutes of Illinois. In so doing it was not "prosecuting its business" in Illinois within the meaning of the statute, and it seems to us, as already stated, that along this line a rule may be formulated based upon principle. Accordingly, upon this idea, although not distinctly announced in so many words, repeated decisions have been made denying the jurisdiction by the circuit courts of appeal and the circuit courts.

Thus in the case of *Central Grain, etc.,* v. *Board of Trade, etc.,* 125 Federal 463, on page 466, Judge Jenkins, speaking for the circuit court of appeals of the seventh circuit, says:

> "There could be no presumption of its presence within the state of Illinois. There were but two conditions in which the court below could obtain jurisdiction over the corporation; the one by voluntary appearance—a condition which did not occur; the other, if the corporation prosecuted its business in the state of Illinois, by service of process upon some officer or agent in that state *ap-*

*pointed to there transact and manage its business and representing the corporation in such state.* Service upon an agent of a corporation is not service upon the corporation, unless it be engaged in business in the state where said agent is served and *he be appointed to act for it there.*" (The italics are ours.)

It seems to us that, if Judge Jenkins meant what he said and said what he meant, this is precisely that for which we are contending. In support of this decision he cites a number of cases.

In *N. K. Fairbanks & Co.* v. *Cincinnati, etc., Railway Co.*, 54 Federal 420, an attempt was made to bring into court a foreign railroad company in Chicago by service upon a person employed by the defendant at the time of the alleged service of the writs for the sole purpose of diverting freight and passengers destined south to such railroads leading out of Chicago as had running connection with the defendants' line at Cincinnati. It appeared that such person had no authority to sell tickets or to make contracts or rates for the transportation of freight and passengers; but the defendant, at its own expense, supplied him with office accommodations in Chicago, for the purpose of doing the work he was assigned to do. It was held by the circuit court of appeals that he was not an agent within the meaning of the law, and the service was set aside. This was a decision before Justice Harlan, Judge Gresham and Judge Woods, circuit judges, Judge Woods dissenting.

The same doctrine was declared by the same court in *Wall* v. *Chesapeake, etc., Railroad Co.*, 95 Federal 398.

The language of this court in the case of *Fitzgerald, etc.*, v. *Fitzgerald*, 137 U. S. 98, is in support of the same idea. It is there said: "Where a foreign corporation is not doing business in the state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state so that service can be made upon it." (*St. Clair* v. *Cox*, 106 U. S. 350; *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U. S. 138.)

In the case of *St. Clair* v. *Cox*, 106 U. S. 350, on page 355, Mr. Justice Field says, speaking of the fact that companies incorporated under the laws of one state carrying on a vast volume of business in other states, and of the old rule that a corporation could not migrate and the inconvenience resulting therefrom, says that the legislators of the states have interposed and provided for service of process on an officer or agent of a foreign corporation doing business therein:

> "Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices to carry on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in its courts for obligations and liabilities there incurred."

Further along in the opinion Justice Field says: "A corporation of one state can not do business in another state without the latter's consent, expressed or implied, and that consent may be accompanied with such conditions as it may think proper to impose."

It is submitted that this language clearly implies that the business to which reference is had is such business, and such business only, as the state has seen fit in its sovereign capacity to inhibit, except after a license has been procured. It certainly does not refer to casual transactions, such as a local corporation in one state sending agents into another state to buy material to be used in the prosecution of its business, although, of course, if such a corporation should establish an agency for such purpose, and make a regular business of such purchases, a very different proposition would be presented; a proposition like that involved in the fact of a manufacturing corporation having its *situs* in one state and its selling agency in another state.

In the *St. Louis Wire Mill Co.* v. *Consolidated Barbed Wire Co.*, 32 Federal 802, the defendant was a corporation of Kansas. Its chief place of business and office was at Lawrence, in that state. It had never had any business office in Missouri, nor maintained an agent in that state for the transaction of any business. It had made occasional purchases of plain wire in the city of St. Louis, either by correspondence or by sending an agent there for that purpose. In December, 1885, one Henley, who was served with process in the case, purchased of the plaintiff in the city of St. Louis five hundred tons of wire. Subsequently a controversy arose as to the terms of the purchase. That controversy remained open and unadjusted until October 6, 1886, at which time Henley and his wife came to St. Louis for the purpose of attending the fair. While there he was called upon at his hotel by the secretary of the plaintiff, with a view to an adjustment of the old account. Conversation was had on that subject, but the parties failing to agree, the secretary of the plaintiff and Henley went to the office of the Southern Wire Company to confer with other officers of the plaintiff corporation with respect to a settlement. Further conversation took place at the office of the Southern Wire Company, but it resulted in the parties failing to come to any understanding. While at the office of the Southern Wire Company Henley asked an officer of that company to give him a quotation on five hundred tons of plain wire, as if he desired to make such a purchase. No quotation was made him, however, and no purchase was made. After Henley left the office of the Southern Wire Company, and within a few hours, he was served with process, and it was held that he was not an agent for the Kansas company doing business in Missouri.

The same doctrine was laid down in *Good Hope Co.* v. *Railway Barbed Fencing Company*, 22 Federal 635.

In *United States* v. *Telephone Company*, 29 Federal 37-41, it was held by Judge Jackson that a corporation, in order to bring itself under liability to such service, must transact within the state some substantial part of its ordinary business through an agent appointed for that purpose.

*Maxwell* v. *Atchison, etc., Railroad Company*, 34 Federal 286, we have a decision by Judge (afterward Justice) Brown. That was a suit in Michigan against the Atchison Railroad, service being made upon one Gilman, who was the agent of that company in Detroit, and solicited persons intending to travel in Kansas to patronize the defendant road. That was the extent of his agency, except that he was also employed by the defendant to compromise plaintiff's claim, which was for expulsion from a train of defendant. This agent, Gilman, was represented upon the folders of the defendant as its "passenger agent." Judge Brown says:

> "The general rule appears now to be well settled that a foreign corporation may be sued within any jurisdiction wherein it carries on an important part of its business. Where under the laws of the state it is required as a condition of doing business within the state that it shall appoint an officer or agent upon whom process may be served, such corporation is always treated as 'found' with-

in the state within the meaning of the judiciary act, and suits in the federal courts may be instituted by service upon him," (citing numerous cases).

"On the other hand, when an officer of a foreign corporation is temporarily visiting or traveling within the state, it is equally well settled that service of process against the corporation can not be made upon him, if the corporation is not actually doing business within the state." (*St. Clair* v. *Cox*, 106 U. S. 350; *Newell* v. *Railway Company*, 19 Mich. 336.) "What is the amount or character of business which a corporation must do to subject its agent to process within a foreign state, is left in some doubt by the authorities. If it have an office for the general transaction of its business, or selling of its goods if it be a manufacturing corporation, or the making of contracts and the receiving of freight and passengers if it be a railroad company, it would appear to be sufficient."

After further discussion Judge Brown refers to the decision of Judge Jackson in the telephone case heretofore referred to, holding that such business, in order to justify service, must be transacted or managed by some agent or officer appointed by and representing the corporation in such state. And further along he says that from the folders of this company defendant it appears that it has agents of like character in a dozen different states. If it could be sued in Michigan for a cause arising in Kansas, it is equally amenable to suit in any one of those states in which it may happen to have a passenger agent for soliciting business. "It would, in my opinion, be an unwarrantable extension of the law of constructive presence to hold a road liable to suit in all of these different states, as a corporation or inhabitant found therein. The same principle would make every manufacturing or trading corporation liable to suit in any state into which it sent a commercial agent, or drummer, to solicit patronage."

So the language of Judge Hallett, in *Weller* v. *The Pennsylvania Railroad Company*, 113 Federal 502, seems to be directly in point, although in that case the question was somewhat different, as it arose in a patent case under the United States statute with reference to service on the defendant company. After discussing that question, Judge Hallett says that if he is mistaken in the view already taken, the Fairbanks case, the Wall case, and the Maxwell case hereinbefore cited, are in point.

"In these cases and in all that I have examined, the question considered was as to the character of the agent and the scope of his authority. Under the act of congress, the question is whether the defendant has a regularly established place of business, without reference to the character of the agent who may be in charge."

So it seems to us the case of the *Mutual Life Insurance Company* v. *Sprattley*, 172 U. S. 602, while it sustains the service in that case, supports our contention. In that case it is held as the reason why the service is supported that the insurance company, although it had withdrawn from the prosecution of further active business in the state, was nevertheless still engaged in the insurance business in the state in connection with its pre-existing policies. That is, it was prosecuting its regular business in the state.

In the *Louden Machinery Co.* v. *The American Malleable Iron Company*, 127 Fed. 1008, we have a decision of Judge McPherson, of Iowa, which seems to us to be directly in point. The facts in that case were that the plaintiff, an Iowa corporation, purchased certain iron of defendant, an Illinois corporation, to be delivered f. o. b. Chicago. A difference occurring between the parties was attempted to be settled by their attorneys, who resided in Chicago, and having failed, defendant's president, having occasion to travel through Iowa, stopped at plaintiff's place of business in order to settle the claim; and an offer being made by plaintiff on his stating that it would be necessary to lay plaintiff's proposition before defendant's board of directors, notice of suit was served on him. It was held that the service on defendant's president, under such circumstances, was insufficient to confer jurisdiction on the Iowa courts. Judge McPherson says, with reference to this state of facts:

> "But it is said that because defendant's president came to the state on a visit and stopped off a train to try to settle a business difference, he thereby subjected his company to the jurisdiction of the Iowa courts. Carrying on a business by a corporation in another state means something more than a single transaction, and certainly something more than the one transaction of an attempt to compromise a matter connected with a contract in the state where the foreign corporation resides and has its being," citing numerous cases. "As yet I can not believe that a foreign corporation having a difference with an Iowa citizen concerning a contract not made in this state, surrenders itself to the Iowa courts, because an agent, with or without authority, comes to this state seeking to adjust such difference. If such be the law, then compromises, which are so much favored by law, are largely at an end, as to foreign corporations. The only case called to my attention upholding plaintiff's contention is one decided on the circuit by Judge Grosscup, in the case of *Houston* v. *Filer, etc., Co.,* 85 Federal 757, and that case is not authoritative, and, standing alone as it does, I can not follow it."

The Houston case, *supra,* has been followed by Judge Amidon, *Brush Creek, etc., Co.* v. *Morgan, etc., Co.,* 136 Federal 505, and he goes to the full length of saying that if an officer of a corporation goes into another state to settle a claim, he thereby subjects his corporation to suit. It seems hardly necessary to comment on this decision.

The doctrine for which we contend is fully set forth and enforced in the case of *Frawley* v. *Pennsylvania Casualty Company,* 124 Federal 259, a decision by Judge Archibald. Also in the *Buffalo Glass Company* v. *Manufacturers' Glass Company,* 142 Federal 273. It is there shown by the authorities that occasional purchases by a foreign corporation within a state, no office being kept nor any part of its general business operations carried on there, does not justify service, and numerous other cases are cited showing, as is stated, that in order to justify such service the agency must be of a substantial character and the business a part of the regular business of the company.

On the other hand, attention will doubtless be called to the Houston case, *supra,* decided by Judge Grosscup, and the recent decision of Judge Platt in Connecticut, *New Haven, etc.,* v. *Downingtown, etc.,* 130 Fed. 605, neither of which, as it seems to us, will bear examination. Indeed, it seems to us that the key to Judge Platt's decision is found in the following quotation:

> "The court did not invite the cause, but it is here, and unless an inexorable sanction exists, it is not inclined to force a domestic corporation to migrate to a foreign forum in search of justice. It would seem ungracious for the defendant to permit its agent to visit Connecticut concerning matters which touch one branch of a transaction, and to object to service upon such agent of a notice that the plaintiff seeks to recoup in one direction what he has lately lost in another."

In that case the president of the defendant corporation arrived in New Haven to attend the National Christian Endeavor Conference to be held at that place. He was not present in New Haven for any other purpose than that aforesaid. While in New Haven, however, he had some negotiations with reference to a settlement of the claim against his company. Judge Platt holds, as we submit, directly at variance with the decisions of other circuit courts, the circuit court of appeals and this court, that doing business within a state does not mean a persistent and continuous condition of doing or offering to do business, usually leading to the appointment of an agent or the establishment of an office within the state. The fact that Judge Platt refuses to recognize the distinction between the corporation and the partnership whose business it has purchased, seems to us to be very significant. What might have been the rights with reference to the partnership, is wholly immaterial. It was not the same entity as the corporation, and the attempt to confuse the two is misleading. *Pullman, etc.,* v. *Missouri, etc., R. R.,* 115 U. S. 587. Judge Platt contends that because the corporation had made five sales in the state of Connecticut, amounting in the aggregate to less than $100, it was doing business in the state; although it does not appear that even these goods were sold through an agent in Connecticut. Nor is his reference to the California case, *Dow* v. *Springfield,* 104 Federal 684, more persuasive. It is not seen how the fact that the latter was an admiralty case is material. The question is simply: "Was the agent doing business in the state in such a way as to bring the corporation into the state subject to service?"

There is this, however, to be said in reference to Judge Platt's decision, that the transactions there were sales in the regular course of business of the corporation, not purchases with a view of launching a corporation.

As against this decision by Judge Platt and that of Judge Grosscup in the Houston case, attention is called to the decision of Judge Wallace in *Good Hope* v. *Railway Barbed Fencing Company,* 22 Federal 635, where it is held that the fact that the president of a corporation is in a state for the purpose of adjusting a controversy growing out of a purchase, does not subject him to service of summons so as to give jurisdiction. It is evident that this decision of Judge Wallace is directly contradictory to that of Judge Amidon and the others along that line.

So in *Clewes* v. *Woodstock Iron Company*, 44 Federal 31, a decision by Judge Lacombe held, following the Good Hope case, that the fact that a corporation which has done no business in New York beyond negotiating a mortgage on its property and having the bonds secured thereby put on the list of the New York Exchange, is not engaged in business in the state, and no jurisdiction over it is acquired by a service of summons on its president while temporarily in the state for this purpose.

In *Gilchrist* v. *Helena, etc., Railroad Company*, 47 Federal 593, it is held by Judge Knowles that a statute requiring a corporation to take out a license before doing business in the state is not violated by a foreign trust company which takes a mortgage in the state upon the railroad company's property to secure bonds, because "such isolated act is not doing business in the state."

So in *Caesar et al.* v. *Capell et al.*, 83 Federal 403, it is held that where a foreign corporation which has not complied with the statutes of Tennessee by filing its charter, etc., through any agent whatever, makes a loan to a citizen of Tennessee which he contracts to repay at the domicile of the corporation, secured by a mortgage on land in the state of Tennessee, this does not constitute doing business in the state of Tennessee, within the prohibitory and penal provisions of the statute.

In like manner in *Eirich* v. *Donnelly Contracting Company*, 104 Federal, page 1, it is held that a corporation of New York, having its office in Buffalo, which does not maintain and has never maintained any office or place of business in Ohio, is not found in that district within the meaning of the federal statutes so as to be subject to service, because one of its officers is temporarily in Ohio superintending work being done by the corporation in a harbor under a contract with the United States, and service of process upon such officer confers no jurisdiction on the courts of the state or district over the corporation.

Finally, upon this point, attention is called to the decision by this court in the case of *Cooper Manufacturing Company* v. *Ferguson,* 113 U. S. 727, where it is held that, while it is competent for a state by statute to prescribe the terms upon which a corporation shall be permitted to come into the state to do business, that is, to establish and maintain agencies in the state for the purpose of carrying on its ordinary business, it is not competent for it to forbid entirely, or to impose restrictions upon the manner in which outside corporations shall buy and sell within the state, since that would be an interference with the interstate commerce law. It seems to us, without further argument, that what was done in the cases at bar was in the way of transactions of the latter character, and not the former, and that therefore the Merchants' Heat and Light Company was never engaged in business in Chicago in such a sense as to subject it to the service of process.

II. Passing to the other question, it is found, as we have already shown, on page 24 of the transcript in the special finding of the judge, that the company defendant was to pay Schott for all materials, labor and everything in the entire plant, $275,079.38, including his compensation, which was to be 10 per cent. of all bills for construction. It thus appears that Schott had undertaken, on his own account, and for a fixed sum of money, to purchase all materials, perform all labor, and install this plant and put it in operation. Thus it is perfectly clear that he was the principal, and the Merchants' Heat and Light Company was a mere surety in this transaction. If he made the purchases and failed to pay the bills, by their permitting him to use their credit they would become liable, immediately liable, to purchasers; but he was making the purchases for himself; he was not making them for the company; therefore it was he, that, in making these purchases and attempting to adjust any difference in Chicago, was doing whatever "business" was done, and not the corporation. If he failed to pay the bills and the company was compelled to pay them, they would have their right to action against him; but it is certainly clear that the one who guarantees the bills of another contracted in a foreign state, or lends its credit for such bills, does not thereby do business in that state, within the meaning of the statute under consideration. Whatever was the character of business being done, it was Schott's business, not the business of the Merchants' Heat and Light Company.

Moreover, the finding is that Schott was maintaining a business office in the Marquette Building, Chicago, that his name was on the door as engineer and contractor, and that he paid the rent. There is no finding that the company was doing business in said city, except as it finds that Schott was the general manager for said company, and the finding is that he made purchases of cables, engines, boilers, generators, pipe, fittings and other supplies in that city. And it is to be noted that every suggestion of business done by Schott, even as general manager, is business, not of the corporation, for which he was required to take out a license in Illinois, not business contemplated by the statute at all, but simply purchases such as might be made by any party preparing to install a plant in any center of trade. If, as the authorities above cited seem to indicate, the business contemplated by the statute is such as it would be unlawful for the corporation to do in Illinois except under license, then it is perfectly clear that this service ought to have been quashed and the jurisdiction denied.

III. By the second conclusion of law, page 28, the judge declares that by reason of the fact that defendant pleaded a set-off in an amount greater than plaintiff's claim, it thereby waived all objections to jurisdiction. In other words, that because after making every possible objection and taking every possible exception to the right of the court to proceed at all, as it believed in violation of its rights, the court insisted in going on and adjudicating the case, then the defendant would insist upon having all its rights determined in the one litigation, - it waived all question as to jurisdiction.

Suppose it had a genuine set-off for an amount greater than the amount claimed in the complaint, was it bound, in order to maintain its rights and not be sued in Illinois, to divide that set-off into parts and have two or three litigations instead of one? If any authorities have been cited for the support of this proposition, they have never been seen by the writer of this brief, and it is not believed that the proposition contained in this second conclusion of law is correct.

It has been repeatedly held that where a party once makes objection to the jurisdiction and reserves a right thereunder, he does not waive an illegality in the service, if, after said motion is denied he answers to the merits. Set-off is certainly part of the answer to the merits, and, it seems to us, is no waiver.

*Central Grain, etc.,* v. *Board of Trade, etc.,* 125 Federal 463, Circuit Court of Appeals, Seventh Circuit. *Lowden, etc.,* v. *American, etc.,* 127 Federal 1008. Is it to be held that a party could divide up a claim and litigate it in two parts? and if not, then to hold this conclusion of the judge to be right is to deny to a party all of his claim over and above that of the plaintiff.

We ask that the judgment of the Circuit Court be reversed.

W. H. H. MILLER,
*Attorney for Plaintiff in Error.*

JAMES W. FESLER,
C. C. SHIRLEY,
SAMUEL D. MILLER,
*Of Counsel.*

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No. 118.

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IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1906.

**MERCHANTS HEAT & LIGHT COMPANY,**
*Plaintiff in Error,*
*vs.*
**JAMES B. CLOW & SONS,**
*Defendant in Error.*

Writ of Error to Circuit Court, Northern District of Illinois.

# BRIEF OF DEFENDANT IN ERROR.

NEWTON WYETH,
WARREN B. WILSON,
ATTORNEYS FOR DEFENDANT IN ERROR.

WALTER L. FISHER,
OF COUNSEL.

BARNARD & MILLER, PRINTERS, CHICAGO

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# BRIEF OF DEFENDANT IN ERROR.

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## STATEMENT.

The defendant in error, a corporation organized under the laws of the State of Illinois, having its principal office and place of business in Chicago, in the Northern District of Illinois, brought in the Circuit Court of the United States, for the Northern District of Illinois, action of assumpsit, for goods sold and delivered, against the plaintiff in error, a corporation organized under the laws of the State of Indiana, having its principal office and place of business at Indianapolis. Summons was issued and served on the defendant in the manner provided by the statute of Illinois by "reading the same to W.

H. Schott, general manager of said company, the president and other officers not being found in the district." (Transcript of Record, p. 3.) The statute is as follows:

> "An incorporated company may be served with process by leaving a copy thereof with the president if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county."
>
> Sec. 4, Ch. 110, Rev. Sts. Ill.

The defendant appeared specially for the purpose and

> "moved the court to quash the return of the marshal upon the summons issued in said cause * * * for the reason that said defendant is and was at the time this action was commenced, and ever since has been, a corporation organized and existing under the laws of the State of Indiana, and engaged in business only in said state, and never has had any office, place of business or agency in Illinois." (Tr., p. 13.)

This was supported by an affidavit of Mr. Schott, that he was a resident and citizen of Chicago, an engineer and contractor, and had and maintained offices in the Marquette Building, Chicago. That for six months past he had been engaged in installing a light and heat plant at Indianapolis for the defendant, which was an Indiana corporation not engaged in business at Chicago or Illinois, as affiant is informed and believes. (Tr., p. 13.)

Also an affidavit of William C. Bobb, that he was president of defendant, that it was an Indiana corporation, that it had no office, and was not engaged in business in Illinois. (Tr., p. 14.)

The plaintiff opposed the motion, and filed an affidavit of William E. Clow, that he was the vice-president and manager of the plaintiff, James B. Clow & Sons; that he knew Schott and had had repeated conferences with him about the matters in controversy; that throughout the whole matter Schott acted as the general manager and representative of defendant; that during the whole time Schott maintained an office at Chicago; that all the business between plaintiff and defendant had been done at that office, frequent conferences being held there, Schott always representing the defendant, and that said office was continuously treated as the office of the defendant and Schott as its only representative; that Schott was a resident of Chicago, and general manager of the defendant company, was so advertised, named as such on the letter-heads of the defendant, and said office in Chicago has been continuously recognized and treated as the office of the defendant as shown specially by letters and telegrams submitted. (Tr., p. 15.)

A number of letters and telegrams were also submitted from the defendant to the plaintiff all relating to the particular matter in controversy and signed, "The Merchants' Heat and Light Co., by W. H. Schott, general manager." Some of these letters are from the Indianapolis office with letterheads showing Mr. Schott the general manager, others from this Chicago office, but all signed as indicated,—the Company, by W. H. Schott, Gen. Mgr." (Tr., pp. 16, 17, 18, 19.)

This office was otherwise treated as the office of the Company. Thus, on December 27, 1902, the plaintiff received this telegram from defendant:

> "Indianapolis, Ind., Dec. 27, 1902. James B. Clow & Sons, Chicago, Illinois. See Mr. Schott at Chicago office Monday 10 A. M. Merchants' Heat and Light Company." (Tr., p. 18.)

An affidavit of Horatio S. Collins was also filed, setting out that he was city salesman for plaintiff, and as such conducted for plaintiff the negotiations resulting in the contract between plaintiff and defendant, under which the goods in question were delivered by plaintiff to defendant; that all the negotiations were had at said office, and Schott in them all acted for and represented the defendant; that the contract was finally made August 13, 1902, at the said office in Chicago, Collins signing for plaintiff and the defendant signing its name, "by W. H. Schott, general manager." That the defendant regularly advertised Schott as its general manager in its letter-heads; all correspondence was done by Schott. That during all this time Schott maintained the office at Chicago and all the negotiations were had and the contract signed at said office in Chicago; that affiant verily believes that the said Schott was the regularly authorized agent of the defendant in Chicago and the said office maintained by Schott in Chicago was the regular office of the defendant; that no visible change had taken place in said office, and all the business had been conducted for the defendant by Schott. (Tr., pp. 19, 20.)

The contract, the basis of this suit, provided for the sale and delivery by the plaintiff to the defendant by October 1, 1902, of a large quantity of different kinds of pipe, valves and fittings. This contract is dated Chicago, was executed and delivered at the Chicago office, and signed by defendant, "Merchants' Heat & Light Company, by W. H. Schott, general manager." (Tr., p. 21.)

The motion to quash was overruled, and the defendant ruled to plead in thirty days. (Tr., p. 22.) And the defendant filed a bill of exceptions, showing the foregoing matters. (Tr., p. 12.)

The defendant then filed (Aug. 14, 1903) the general issue (Tr., p. 6) and therewith a notice of set-off, claiming that the plaintiff was indebted to the defendant in the sum of $15,000 by reason of damages alleged to have resulted from delay in delivering pipe, valves and fittings within the time stipulated by contract of Aug. 13, 1902. (Tr., pp. 6, 7.) Also an additional notice of set-off was filed March 29, 1905, claiming $4,000 for over-payments. (Tr., p. 8.) These demands were shown in a bill of particulars filed Dec. 3, 1903, aggregating $20,831.89. (Tr., pp. 8, 9.) The affidavit of plaintiff's claim was $9,391.01. (Tr., p. 6.)

The statute of Illinois as to set-off is as follows:

> "The defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action, may plead the same, or give notice thereof, under the general issue, or under the plea of payment; and the same, or such part thereof as the defendant shall prove on trial, shall be set off and allowed against the plaintiff's demand, and a verdict shall be given for the balance due. And if it shall appear that the plaintiff is indebted to the defendant, the jury shall find a verdict for the defendant, and

> certify to the court the amount so found; and the court shall give judgment in favor of such defendant, with the costs of his defense. If the cause is tried by the court, the finding and judgment shall be in like manner."
>
> Sec. 29, Ch. 110, Rev. Sts. Ill.

> "When such plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court."
>
> Sec. 30, Ch. 110, Rev. Sts.

A jury was waived by stipulation, this stipulation being without prejudice to the right of the defendant to raise the question of jurisdiction which had been theretofore presented, and a trial had before the court. The set-offs and counter claims were disallowed, except one item of $18.00, and a deduction was made of $317.16 for freight paid by defendant (Tr., pp. 27, 28.) and a judgment was rendered for the plaintiff for $9,082.21. (Tr., p. 12.)

The question of jurisdiction was further gone into at the hearing and a special finding of facts and conclusion of law made and filed in accordance with the written stipulation and preserved by bill of exceptions. (Tr., 23.) The conclusion of law on jurisdiction was that the "defendant was during all the time from August 12, 1902, to the commencement of suit doing business in Chicago, Illinois, and during all that time William H. Schott was its general managing agent. Service of summons was properly made upon him as such agent." (Tr., 28.)

The case is brought directly to this court by writ of error on the questions of the jurisdiction only of the Circuit Court, which are:

1. Were William H. Schott's relations to the defendant company such that service upon him in Chicago constituted service upon the defendant, an Indiana corporation, in the Northern District of Illinois?

2. Was the filing of the counter claim by the defendant and trial thereon a waiver of the jurisdictional question and to be properly construed as a submission to the jurisdiction of the court?

# BRIEF.

The general jurisdiction of the Circuit Court arising from diversity of citizenship of the parties is not in question in this case, but it is urged by the plaintiff in error that the service of process had in Illinois was not upon an officer or agent of the defendant, such as to give the Circuit Court jurisdiction to render the judgment in question against the defendant, and that the defendant was not doing business in Illinois at the time of service. The defendant in error, plaintiff below, submits that the Circuit Court had jurisdiction upon this record to render such judgment.

I. The defendant was properly served with process.

II. If not properly served, the objection was waived by filing and going to trial upon the notice of set-off.

While, in suits at law, that service of process which subjects a party in a court of competent jurisdiction under the state law, is sufficient process to the same end in such suits when brought in the federal courts (*Van Dresser* v. *Oregon R. Co.*, 48 Fed., 202, 205), and the service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is held valid by the state courts, will be recognized by the federal courts, yet the defendant in error bears in mind that such rule of the federal courts is "subject to the fundamental principle that no one shall be condemned unheard or compelled to answer a complaint in a foreign jurisdiction except upon such notice of the proceedings as is fair and reasonable, and the federal courts must judge for themselves whether the mode of service prescribed by the laws of a particular state satisfies these requirements." (*McCord Lumber Co.* v. *Doyle*, 97 Fed., 22.)

## I.

The defendant, an Indiana corporation, was properly served with summons in the Northern District of Illinois upon William H. Schott, its general manager in the district.

The only questions affecting the legality of this service are:

1. Was Schott an agent of the defendant of character to be substantially representative of the defendant?

2. Was the defendant doing business in Illinois?

The service was valid.

It was made in exact accordance with the statute of Illinois for service on non-resident corporations.

> "An incorporated company may be served with process by leaving a copy thereof with its president if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county."
>
> Sec. 4, Ch. 110, Rev. Sts., Ills.

This statute applies to non-resident corporations.

*Hannibal & S. J. R. R. Co.* v. *Crane,* 102 Ill., 255.

Such service made in accordance with the local statute is valid unless so grossly unfair as to amount to denying a hearing.

*Barrow S. S. Co.* v. *Kane,* 170 U. S., 100.
*Lafayette Ins. Co.* v. *French,* 18 How., 404.

There is no question that this is a just statute providing for reasonable service and that service was made in strict accordance with its requirements.

1.

There is no question but that Schott, the "agent" upon whom service was had, on March 23, 1903, was an agent of sufficiently broad authority to represent the defendant and receive service.

The findings of fact show that he was substantially invested with all authority for the company. He was the "general manager," having full control over and charge of the entire construction and operation of the plant of the company and of the entire business of the company, including the making and execution of the contract with the plaintiff and all the transactions involved in this litigation. See findings of facts, Tr., pp. 23, 24.

While the apparent agency and authority of Schott, as general manager of the defendant, held out by the defendant, and by the transactions of Schott on its behalf, which it approved, would appear unquestionably to make Schott such an agent in Chicago as that service upon him there would be good, yet the actual relations and authority of Schott as they existed between him and the defendant would, if they increased his authority in fact beyond that which it appeared to be, be evoked upon discovery to support the service. It developed at the trial that by contract entered into August 7, 1902, between the defendant and Schott, the latter agreed to construct, instal and equip the plant of the defendant at Indianapolis, and to that end purchase all materials and apparatus, employ all labor and personally superintend the construction, assume the general management of the plant and operate it for the company until fully completed, secure all business for the plant and approve contracts therefor, institute a system of bookkeeping, certify bills, have the heating plant ready for service December 1, 1902, and finally finished on or before July 1, 1903. The company was to pay Schott the sum of $275,079.38 for the plant, and his compensation was to be 10 per cent. on all bills for construction. It thus appears that the entire business of the defendant, until such plant should be completed and turned over, was under the absolute control and management of said Schott, and under such control all of the business of the defendant in the way of purchases, procurement of materials and settlements therefor, as well as other details, were carried on by Schott in the name of the company. (Tr., p. 24.)

It is further found that said Schott continued to be the general manager of the defendant until July, 1903, long after service of summons on said Schott at his office in Chicago; that "at this time the construction of the plant had not been entirely completed," and that "said Schott was still acting as general manager as to such construction, and any business of defendant required to be done in Illinois, such as the purchase of cables, engines, boilers, generators, pipes, fittings and other supplies, for the extension of the plant, was done for defendant by said Schott as general manager down to a time later than the beginning of this action," and that the City of Chicago was the principal market for supplies of the kind sold by plaintiff to defendant, and of the kind enumerated in the finding. (Tr., p. 24.)

About the 1st of January, 1903, a controversy arose between the parties in respect of the final payment under the contract, and the right of the defendant to set off damages for the delay in the delivery of the pipe contracted to be sold to defendant, and frequent interviews were held at the office of said Schott in Chicago between him as general manager of the defendant and the agents or attorneys of plaintiff in respect to the adjustment of the controversy. (Tr., pp. 24, 25.)

This controversy was not settled, whereupon this suit was brought March 23, 1903.

The fact that Schott may, at some time, have had other cases on hand for other companies for similar business to that of the defendant (the record does not disclose whether he actually had such cases) does not subtract from the fact that he fully represented this defendant. It cannot be said that he the less represented the defendant because he may also have represented other similar enterprises, unless it be said that by representing all he represented none. The record discloses the nature of the special business to which he devoted himself, and it does not appear that he was at the time actually interested in any other business whatever.

2.

The defendant was doing business in Chicago.

There is no special difficulty about the law on this subject.

Corporations, unlike individuals, can act or be served with process through agents only.

Corporations are residents of the state where created.

The officers and agents of corporations do not ordinarily carry their corporate functions with them outside of the state.

It was the original theory that corporations could not "migrate" or be found for any purpose outside the state in which they were created.

*Bank of Augusta* v. *Earle*, 13 Pet., 584.

The result of all this was that while corporations could "migrate" and be found in other states for the purpose of doing business, for the purpose of taking the benefit of their contracts and bringing suit to enforce their rights, they could not "migrate" for the purpose of being sued. That they were in other states for the purpose of making and enforcing their contracts, but not for the purpose of being made to perform them. That they could get all the benefits but none of the liabilities resulting from their presence in other jurisdictions.

This condition was intolerable, and the conclusion was soon reached that if the corporation by its agent could be in a foreign state for the purpose of making contracts, it was there for the purpose of being sued. The idea that a corporation was part of the sovereignty that created it or anything but a method by which persons associated themselves together for a common purpose was abandoned, and the ability of corporations to transact business away from home was recognized.

*Lafayette Ins. Co.* v. *French*, 18 How., 404.

That a corporation did business in a foreign state only by the courtesy of that state, which could impose any reasonable conditions upon that permission. That the requirement that it submit to service of process in that state was reasonable.

*Lafayette Ins. Co.* v. *French*, 18 How., 404.
*St. Clair* v. *Cox*, 106 U. S., 350.

Then that the existence of laws for the service of process on foreign corporations carried an implied consent by any foreign corporation coming into the state to do business there that it might be served in that manner.

The question, as stated in *Lafayette Ins. Co.* v. *French*, 18 How., 404, was this:

> "In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation should also be deemed its agent to re-

> ceive service of process in suits founded in such contracts.
>
> "Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them."

That language is strictly applicable here. In this case, one of the conditions imposed by Illinois was in effect that the agent who should reside in Illinois and have an established place of business in Illinois and enter into this contract and carry it out in Illinois and at the place of business established for such purpose in behalf of the foreign corporation should be deemed its agent to receive service of process in suits founded on such a contract.

Now, when the corporation sent its agent Schott into Illinois with authority to make and carry out contracts, extending as it did, over months of time, the corporation defendant here must be taken to have consented to the condition upon which alone such business could be transacted by it.

The later cases fully sustain this doctrine, also, that the authority of the agent to receive service of process did not expire with the making of the contract. When an insurance company had entirely withdrawn from the State of Tennessee and was taking no further risks, but had policies unsettled, it was held that it was still doing business in the state; the point being that made in *Lafayette Ins. Co.* v. *French*, 18 How., 404, that if the foreign corporation went into the state for the purpose of making and taking the benefit of the contract, it was there for the purpose of being made to perform it.

*Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S., 602.

We apprehend that the test of what is "doing business" within a state by a foreign corporation, such as to render service of process upon an agent attending to such business valid, is not necessarily that the business must be the same as would be required to lay the corporation open to a penalty for failure, for instance, to file a copy of its articles of incorporation, or to pay certain license fees, or the like, where the statute calls for such act before the corporation shall do business within the state. There might well be a certain permanence or continuity of business, before such laws would be considered as violated by failure to file articles or to do other acts required, although an examination of the decisions of the courts can give little comfort to foreign corporations in this respect. But, be that as it may, can there be any doubt that service of process upon an agent or officer of the corporation engaged in or attending to the business, whatever it is, would be valid service upon the corporation, especially with respect to a controversy growing out of that very business? Schott was certainly the agent of the defendant carrying on its business so fully and to such a degree that at many dates prior to March, 1903, service would have been unquestioned, and at the time Schott was served, he was within the territorial limits of the jurisdiction, where he was on the sole business of the defendant, both in respect to completing and carrying on the plant and business of the defendant at Indianapolis and in respect to the controversy with the plaintiff which was still unsettled, and therefore the business of the defendant, with Schott as representative, still continued relations of agency, sufficient for the purpose of service of process upon him as agent of the defendant.

The fact that the defendant did not pay the rent of the office in Chicago is not material. No special fact or form is necessary to show the liability of the foreign corporation to service.

The courts have frequently said they would not attempt to define fraud, as, fraud being a thing to be concealed or disguised, if any particular form or fact was found to be essential that fact or that form would be studiously avoided or disguised.

The same reasoning holds good here.

A foreign corporation defendant always desires to escape liability to answer to the citizens of a foreign state in their home courts for liability upon contracts made with them in their own states, and if any particular form was held to be essential, as the painting the name on a door of an office or the establishment of an office or the payment of rent, or anything else, that form would be studiously avoided.

In *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S., 424, the defendant took all possible steps to escape this liability. It was a Delaware corporation, having an office at Hammond, Indiana. Certain brokers established offices in Chicago, took and transmitted orders to the corporation at Hammond, but the contract expressly denied that they were agents of the defendant. The orders were professedly taken on behalf of the brokers, who claimed to be acting on their own account, in every detail. Upon the surface the persons upon whom service was had, and whose dealings were held to be doing business by the defendant in Illinois, professed to act on their own account, but the court went back of all these forms and said that in substance and effect these orders were being taken for the benefit of the defendant, and that the defendant was therefore doing business in Illinois.

The cases in which jurisdiction was denied are cases in which the agents of the company were casually in the district upon their own business, as in *Goldy* v. *Morning News*, 156 U. S., 518. The manager of the News, a non-resident corporation, was casually in New York, on his own business, and not charged with any business of the corporation.

But here the agent was not casually but permanently in the district; he had an office regularly established in the Northern District of Illinois, in which he as the agent of the defendant regularly did the business of the defendant.

The name on the door was William H. Schott, Engineer and Contractor, and he paid the rent, but that is not at all the same thing as if he had a law office in Chicago and happened to be, for example, a member of the board of directors of this corporation. But his business transacted at that office was organizing just such heating and lighting corporations as this, and constructing this plant of the defendant. Finding No. 1, p. 23.

It is assumed that necessarily all of the business of the defendant would in time be done at Indianapolis, but up till and after the time when the process was served in this cause, the business of the defendant was the construction of the plant. A very essential part of that business of constructing the plant was securing the materials. That was a work requiring, as appears from this record, constant attention and the whole of it was committed to Schott and to be done at Chicago. The contract was made and carried out at Chicago by the company through Schott at this office. Finding No. 1.

The City of Chicago was and is the principal market for supplies of the character furnished by the plaintiff and required by the defendant in constructing its plant, and all of this business, not merely the making, but the executing, of this contract, spread over a series of months, and there was no visible change till after the service of process; all business except what was done by correspondence to Indianapolis was done at the office of Schott in Chicago and by Schott on behalf of the defendant. (Tr., p. 24.)

It would seem not to be doubtful that this company was doing business through Schott at Chicago, and that a service upon Schott at this office in an action upon the contract made and carried out by him at that office differs very essentially from service upon the manager of a foreign newspaper who might for one day for his own business or pleasure happen to be in New York.

This rule allowing service upon the agent of a corporation in a jurisdiction different from that of its home office is a matter of substance and not of form. It is not a matter of contract or mere volition of the defendant; it is a liability forced upon it by the facts. No matter what form the corporation may give, if in fact it "migrates" to a foreign territory for the purpose of making and executing contracts and receiving the benefit of them, as was done in this case, through its agent, in an established place of business, where dealings are regularly carried on, it cannot thus be in a state for the purpose of receiving the benefit of its presence and not be in the state for the purpose of being subject to its liabilities.

This is the essence of *Lafayette Ins. Co.* v. *French*, 18 How., 404.

*Barrow Steamship Co.* v. *King*, 170 U. S., 100.

*St. Clair* v. *Cox*, 106 U. S., 350.

*Board of Trade* v. *Hammond Elevator Co.*, 198 U. S., 424.

*Ex parte Schollenberger*, 96 U. S., 369.

*Houston* v. *Filer & Stowell Co.*, 85 Fed. Rep., 757.

It is contended that the defendant was not doing business in Illinois, because:

1. The business being done was done by Schott personally and not by the company, the defendant company being only Schott's surety; the basis for this contention being the fact that the company agreed to pay Schott for his services as general manager during the construction period 10 per cent. of all bills, Schott in substance guaranteeing that

under his supervision the expense of installing the plant would be $275,079.38.

This position is not strongly contended for and is not believed to require any very serious answer. Whether what was done constitutes doing business or not is one question; but that whatever was done was done by the defendant corporation through its general manager, and not by Schott as an individual, is plain enough. There is not a suggestion of the individual anywhere.

The contract is signed "Merchants' Heat & Light Company, by W. H. Schott, general manager," not William H. Schott, with an addendum, "We guarantee the above. M. H. & L. Company."

Every letter, every telegram, every paper of any kind is signed "Merchants' Heat & Light Company, by W. H. Schott, general manager."

Even if a private contract had been shown between Schott and the company to the effect claimed, viz.: that Schott should do all these things himself and the company be his surety, that would in no way touch the rights of third parties.

The whole substance of the rule holding foreign corporations to answer in the domestic courts for failure to perform contracts which they "migrate" into this domestic territory to make and to take the benefit of, could be easily done away with if this doctrine were admitted. The insurance company, in such a case as *Lafayette Ins. Co.* v. *French,* 18 Howard, 404, could easily contract with its agents that they should not be agents but principals, that the agents should be liable primarily on the policies and the company to be the sureties of the agent loaning him their credit. If that were allowed to establish that the company was not "doing business" in that place, a very simple way is found to reproduce the exact state of affairs the rule in *Lafayette Ins. Co.* v. *French, supra,* and the subsequent cases was established to prevent—*i. e.,* the foreign companies could again establish themselves in business in different jurisdictions and compel all persons seeking to enforce the contracts made with them to go to the remote home states of the corporations. They could take all the benefits of "migration" and refuse all the burdens. They could be always present in the other state to take all the advantage of such presence in making contracts and taking profits, and always absent when asked to perform their obligations there assumed.

If this was ever doubtful, *Chicago Board of Trade* v. *Hammond Elevator Company,* 198 U. S., 424, fully settled it. In that case the defendant, a Delaware corporation, carefully guarded in its contract with the persons doing business in Illinois against these persons being in any way made agents. The contracts made and things done were all in the names of the individuals; but the court looked at the substance rather than the form of the matter, and held in substance that the company was getting the substantial benefit of presence in Illinois through these persons and must take the burdens with the benefits, and held service of summons against the company on such persons was good, and that the activities of these persons constituted doing business in Illinois by the defendant company, notwithstanding the plain, undisputed intent of the parties not to assume the relation of principal and agent, and that, too, for the express purpose of preventing the defendant company from being sued in the state where the business was done.

It is further so contended because:

2. What was done, even though done by the company, was not "doing business." It is argued:

> "It is believed that the solution of the question does not depend on the number of purchases but on the kind of business done. And it is submitted that the business done must be something in the line of that for which the corporation was organized." (Plaintiff in Error's Brief, p. 10.)

We fully agree with this statement as far as it goes.

When it is proposed to hold a non-resident corporation to defend a suit in the domestic court by reason of service of process on an agent or representative resident in the jurisdiction of the domestic court, the important question is, not whether the non-resident corporation has done many or few things in the state where the court is sitting through the agent upon whom process is served, but the "kind" of things done, whether many or few.

A New Jersey steamship company may employ a clerk in Illinois to address and mail advertising circulars and keep him constantly so employed, but the court in Illinois could not by service on such employe acquire jurisdiction over the steamship company in an action for damages for failure safely to carry merchandise. But if the steamship company maintains in the jurisdiction an agent who only occasionally makes contracts on behalf of the company for the carriage of freight, service on such an agent would undoubtedly be good service on the company. The company would be "doing business."

The question varies with each case. In a sense, if a commercial corporation does anything anywhere it is "doing business" there, because such a corporation can never do anything but business.

But is the business done by the company through the agent served business of the same grade as that involved in the litigation? Is the business done through the agent such business as that an agent charged therewith can be considered fairly representative of the corporation in such matters as are involved in the suit in which service is attempted to be made on the corporation through that agent?

Thus, in *Fairbank Co.* v. *C., N. O. & T. Ry. Co.*, 54 Fed., 420, cited, the defendant company had a solicitor engaged continuously in soliciting patronage for the corporation in question. But service on such a solicitor was held not service on the company in an action for failure to carry safely goods delivered to the company.

The same thing is true of *Wall* v. *Chesapeake & C. Ry. Co.*, 95 Fed., 398.

If those cases can be defended at all, it is only on the ground that a solicitor not authorized to make on behalf of the company a contract for transportation or freight carriage or anything else, but only to talk about the advantages of the road, was not fairly representative of the company; that the things done through such an agent were not so "doing business" as to make service on him in such a case service on the company. Or that he, having no authority to make contracts, and no contracts made, not even a ticket sold, the company could not be said to be doing business of any kind.

The test can hardly be that suggested by counsel for plaintiff in error, in the limited sense suggested, *i. e.,* "that the business done must be something in the line of that for which the corporation was organized." (Plaintiff in Error's Brief, p. 10.)

Of course, it must be that. The things done in the state must not be *ultra vires.*

Building its plant is just as clearly part of "that for which the company was organized" as operating it after it is built.

And there is no possible reason why, if, after its plant is completed, this corporation should establish an agency in Illinois for selling heat and light to persons there, service upon such an agent in an action for a breach of a contract made through such agent would be good service, that does not apply with exactly the same force to the present suit. When an agency is established to carry on for the company in Illinois an important part of the work of constructing the plant, viz.: contracting for and acquiring the necessary materials, and suit is brought on this contract made in Illinois, and service had upon the agent charged by the company with both making and carrying it out, the company through that agent is "doing business" and such "business" that service of process on the agent doing it is service on the company.

The reason of the thing is the same in both cases. If the non-resident company has so far "migrated" into Illinois as to make contracts there and take the benefit of them, it has "migrated" sufficiently to be found there for the purpose of being made to perform them there.

The rulings of the District and Circuit Courts are not fully reconcilable. But it is submitted the principle is this, that a corporation accepting the privilege of "migrating" into a foreign state and doing business there does so *cum onere*. That the mischief of the old law sought to be remedied is this, that a corporation being held incapable of leaving the state of its origin, yet being allowed in fact to leave that state and go into other states and make contracts there, it was found that such corporations were in position to take the practical advantage of being in different states to make and enforce contracts and appropriate the profit, but could not be obliged to perform the obligations there assumed without going to the remote state of the origin of the corporation to bring the suit.

The principle required to remedy that mischief is that any corporation which through an agent goes into a foreign state sufficiently to make contracts, in the same way and by the same agent goes into that foreign state sufficiently to be found there and be duly served with process by service on that agent in any suit to enforce the contracts made through him or contracts of equal or no greater dignity.

The rule remains that an individual is not the corporation of which he happens to be an officer in every place where he may go to attend a fair at St. Louis or a Christian Endeavor Society in New Haven. But when he goes abroad as an agent to do business, the corporation may through that agent be sued to enforce the liabilities of the business.

This principle leaves no doubt here. Schott was not casually in Chicago to attend any World's Fair or Christian Endeavor Society. He lived here in Chicago, had a regular office at Chicago, at which the defendant through him regularly did business at Chicago, including the making, modifying and carrying out the particular contract in suit. If it was in Chicago enough to take the benefit of making and carrying out the business, it was in Chicago enough to be served with process through the same agent in the action to enforce that contract.

It seems to be thought that a selling agent stands upon a different footing from a purchasing agent. That a railroad company, for example, establishing an agency in a foreign state to make freight contracts is "doing business" and such contracts may be there enforced, but if the same company establish a purchasing agency with power to conclude contracts for supplies, especially construction supplies, that is not doing business. But this distinction is purely arbitrary. The principle is the same in both cases. If the company is in the state enough to make and take the benefit of its contracts, it is there enough to be made to perform them.

The case cited by plaintiff in error, *Lumberman Ins. Co.* v. *Myer*, 197 U. S., 407, illustrates the position strongly. In that case a Pennsylvania insurance company having its principal office at Philadelphia negotiated a series of policies against loss by fire on property in New York. The company maintained no office in New York, but the whole business was done by correspondence. The property burned. Suit was brought on the policy in New York and service had on a resident member of the board of directors, whose sole duty consisted in attending annual directors' meetings in Philadelphia. This court held the service good. That the company was "doing business" in New York; that the making the policies implied that adjusters were to be sent to New York to adjust the losses; that the losses were payable at New York, because that was the domicile of the creditor. The company was practically having the benefit of possession in New York to make and take the profits arising from these contracts, and must be held to be there for the purpose of being made to perform them.

This case illustrates the principle and goes much further than is necessary to sustain the jurisdiction here.

## II.

### THE NOTICE OF SET-OFF AND TRIAL THEREOF WAIVED ANY DEFECT OF SERVICE.

General jurisdiction of the court not being in question, the right not to be sued in the particular district was a mere personal privilege, which, of course, it was competent for the defendant company to waive.

*St. Louis, etc., R. Co.* v. *McBride*, 141 U. S., 127.

Even if it were doubtful whether process had been properly served and the defendants therefore obliged to appear, any insufficiency in the service has been cured and waived by the defendant. In most jurisdictions it is held that if a defendant desires to question the authority of the court over him, by reason of defective service of process, he must remain out of that court, and that any general appearance cures any such defects, this being a personal right which he can waive, and his appearance and pleading to the merits being held to be a waiver of any defects and a consent that the court may exercise jurisdiction over him in that matter, and that this consent is final. In the federal courts, however, a modification of that rule has been introduced, and it has been held that where a defendant questions the legality of the process employed to bring him into court, and before entering a general appearance in any proper form, objects to the jurisdiction, then if the court insists on taking jurisdiction over his objection, he may contest on the merits the right of the plaintiff to recover, and such contestation does not waive the overruled objections to the jurisdiction of the court.

*Harkness* v. *Hyde*, 98 U. S., 476.
*Southern Pacific Co.* v. *Denton.* 146 U. S., 202.

The rule is stated thus:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived when, being urged, it is overruled, and the defendant is

> thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."
>
> *Harkness* v. *Hyde*, 98 U. S., 476, 479.

These cases, it may be conceded, would have authorized the defendant to file the general issue, as he did, or any plea contesting the right of the plaintiff to recover against him.

But this is not all that was done. A notice of set-off was filed with the general issue, with a bill of particulars, showing that the defendant claimed $20,831.89.

This notice of set-off, under the practice act of Illinois, was not a mere defense, but it was an affirmative suit by the defendant against the plaintiff.

What the defendant did by filing this notice of set-off was not merely a "contestation" of the right of the plaintiff to recover, but it was an affirmative request to the court to adjudicate the issue which it made by that notice, that issue being what amount of money is due from the plaintiff to the defendant upon this claim of $20,831.89. What amount of money is due from the defendant to the plaintiff upon the claim set up by it in the declaration and to render an affirmative judgment in favor of the defendant and against the plaintiff for the claimed excess due the defendant above that due the plaintiff? The statute of Illinois governing the matter is this:

> "The defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action, may plead the same, or give notice thereof, under the general issue, or under the plea of payment; and the same, or such part thereof as the defendant shall prove on trial, shall be set off and allowed against the plaintiff's demand, and a verdict shall be given for the balance due. *And if it shall appear that the plaintiff is indebted to the defendant, the jury shall find a verdict for the defendant, and certify to the court the amount so found; and the court shall give judgment in favor of such defendant, with the costs of his defense.* If the cause is tried by the court, the finding and judgment shall be in like manner." (Sec. 29.)
>
> "When such plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court."
>
> Sec. 30, Ch. 110, Revised Statutes of Ill.,
> Vol. III, Starr & Curtis, p. 3016.

The right to set-off, except as it is enforced in equity, is a matter of local legislation, and the federal courts sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state.

*Charnley* v. *Sibley*, 73 Fed., 980, 982.
*Dushane* v. *Benedict*, 120 U. S., 630.

Leave of the court has been held by Illinois decisions to mean a reasonable discretion by the court, and further, after such plea or notice of set-off the plaintiff cannot dismiss against the objection of the defendant.

*City of E. St. Louis* v. *Thomas*, 102 Ill., 435.
*Butler* v. *Cornell*, 148 Ill., 276.

The defendant filing such a notice of set-off so far from merely contesting the claim of the plaintiff becomes a plaintiff himself, even to the extent of disabling the plaintiff from dismissing the suit without the consent of the defendant or leave of the court. It is true the form of the notice filed does not make that demand, but that is not material. The statute does, and the plea filed is in the exact form in which pleas or notices under this statute are filed, under the practice in Illinois.

The notice says

> "that the defendant will set off and allow to the plaintiff against any demand on his part to be proved on such trial so much of the said sum of money so due the defendant as will be sufficient to satisfy such demand."

This, while nominally only offering a defense, is as a matter of law under the statute a demand for a judgment for any excess.

The form is the exact form used in the Illinois practice for a plea of set-off under this statute.

That is, the conclusion of the plea of set-off in the usual local form book is this:

> "The defendant is ready and willing and hereby offers to set-off and allow to the plaintiff the full amount of said damages."
>
> See Puderbaugh's Common Law, p. 89, Form 105.

The form of notice of set-off filed in the present case is an exact copy of the regular form used in Illinois under this statute. See Form 84, p. 151, Puderbaugh's Common Law, being the form from which this notice is exactly copied.

The defendant company did not confine itself to defenses, but brought the equivalent of an independent suit of its own, and one which it could have brought regardless of the outcome of the present suit.

The question of service was first presented on motion, affidavits and evidence submitted to Judge SEAMAN, who held the service valid. Those proceedings are preserved by a bill of exceptions. (Tr., p. 12.) This bill of exceptions was referred to by Judge SANBORN in his findings and treated by him as part of the facts before him, when he held the service valid on the question being presented a second time at the trial.

The first decision was apparently fully warranted, and, though the defendant had saved the point by its bill of exceptions, it probably concluded, not simply to defend, and depend upon a new suit of its own for recovery of its alleged damages and set-offs, but to ask the court to take jurisdiction of such other suit in the action already begun.

In Illinois, and elsewhere generally, right of recoupment, as well as of counter-claim and set-off, is not waived by failure to plead or give notice, or by refusing to give evidence thereon when admissible without such plea or notice.

Therefore, had the defendant been satisfied with pleading the general issue only, and trying the case without introduction of evidence on recoupment and set-off, it would in no respect have waived the question of service, could have presented the same on writ of error and, if successful, ousted the trial court of jurisdiction; and such proceedings would meanwhile have been no hindrance to its prosecution of its own suit for its alleged damages and set-offs in any jurisdiction in which the plaintiff below might be found; and, further, should the judgment sought to be reversed in such supposed case be affirmed, the same would be no bar.

The only reason why defective service is held to be cured by an appearance is that the defendant is thereby presumed to have consented that the court may take jurisdiction. That implied consent is not so strong as this express affirmative assent. Here is an affirmative request to the court to take up the entire matter in controversy to determine how much is due the plaintiff and how much is due the defendant, and render a judgment in favor of the defendant for the claimed excess.

If the implied consent arising from the filing of a plea of the general issue is a waiver of defective service this express assent and express request of the court to take jurisdiction and render final judgment is much stronger. Objection having been taken originally to the court's assuming jurisdiction, and that objection being overruled, is held not to be waived by merely continuing to resist and oppose the court's assuming to determine the matter. But even though objection to the court's taking jurisdiction may in the earlier stages of the proceedings have been made, the objection to the jurisdiction may at any time be waived, it is still within the power of the defendant to waive that question, and where it not merely contests the right but affirmatively requests the court to assume jurisdiction and render a judgment in its favor, as if it were a case in chancery and he files a cross-bill seeking affirmative relief, the right to object to the jurisdiction is gone.

The defendant in error therefore maintains that the judgment should be affirmed.

Respectfully submitted,

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# Supreme Court of the United States.

No. 118.—October Term, 1906.

Merchants Heat and Light Company, Plaintiff in Error, *vs.* James B. Clow & Sons. | In Error to the Circuit Court of the United States for the Northern District of Illinois.

[January 28, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes up on the single question of the jurisdiction of the Circuit Court, which was saved by bill of exceptions and stipulation, and which is certified to to this Court. The defendant in error, the original plaintiff, and hereafter called plaintiff, is an Illinois corporation; the plaintiff in error is a purely local Indiana corporation, organized for the furnishing of heat, light and power in Indianapolis. The questions are whether the service of the writ was good, (*Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, 435,) or, if not, whether the defendant submitted to the jurisdiction. The material facts are these: The service was upon one Schott in Chicago. By the laws of Illinois a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Schott had an entire contract with the defendant by which he was to build and equip the plant, assume general management of it, and operate it for the company until fully completed, 'approve contracts therefor,' certify bills, and have the heating plant ready for service on December 1, 1902, and finally finished by July 1, 1903. Schott was acting as general manager under this contract at the date of service, March 23, 1903, and did any purchasing required for the company in Illinois. In the same capacity he made the contract sued upon, which was for materials to be used for equipping the plant. He made it in the city of Chicago.—After the suit was begun, a motion to quash the return of service was made and overruled, and thereupon the defendants, after excepting, appeared, as ordered, and pleaded the general issue and also a recoupment or set-off of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.

It is tacitly conceded that the provision as to service does not apply unless the foreign corporation was doing business in the State. If it was, then, under the decisions of this Court, it would be taken to have assented to the condition upon which alone it lawfully could transact such business there. *Old Wayne Mutual Life Association* v. *McDonough*, (Jan. 7, 1907.) Whether the purchase of materials for the construction or equipment of its plant, as a preliminary to doing its regular and proper business, which necessarily would be transacted elsewhere in the State of its incorporation, is doing business, within the meaning of the Illinois statute, was argued at length and presents a question upon which the decisions of the lower Courts seem not to have agreed. We shall intimate no opinion either way, because it is not necessary for the decision of the case in view of the submission to the jurisdiction which the facts disclose.

We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. *Harkness* v. *Hyde*, 98 U. S. 476. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the Court in the same action and by invoking submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand as distinguished from a defence. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. *Davis* v. *Hedges*, L. R. 6 Q. B. 687. *Mondel* v. *Steel*, 8 M. & W. 858, 872. *O'Connor* v. *Varney*, 10 Gray, 231. This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defence.

If, as would seem and as was assumed by the form of pleading, the counterclaim was within the Illinois statutes, (*Charnley* v. *Sibley*, 73 Fed. Rep. 980, 982,) the case is still stronger. For by that statute the defendant may get a verdict and a judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other; and after the cross claim is set up the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. Ill. Rev. Sts. c. 110, §§ 30, 31. *East St. Louis* v. *Thomas*, 102 Ill. 453, 458. *Butler* v. *Cornell*, 148 Ill. 276, 279.

There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. *De Lima* v. *Bidwell*, 182 U.S. 1, 174. *Fisher* v. *Shropshire*, 147 U. S, 133, 145. *Farmer* v. *National Life Association*, 138 N. Y. 265, 270. As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit. See *Kelly* v. *Garrett*, 1 Gilm. Ill. 649, 652. *Ellis* v. *Cothram*, 117 Ill. 458, 461. *Cox* v. *Jordan*, 86 Ill. 560, 565.

*Judgment affirmed.*

Mr. Justice BREWER, Mr. Justice PECKHAM and Mr. Justice DAY dissent.

True copy.

Test:

*Clerk Supreme Court U. S.*